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PUBLIC HEARING
COMMISSION ON STATE MANDATES

--o0o--

TIME: 9:30 a.m.
DATE: March 30, 2000
PLACE: State Capitol, Room 126
Sacramento, California

--o0o--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--o0o--

1 A P P E A R A N C E S

2 COMMISSION MEMBERS

3 PHILLIP ANGELIDES
4 State Treasurer

5 ALBERT BELTRAMI
6 Public Member

7 RICHARD CHIVARRO
8 Representative of the State Controller

9 D. MICHAEL FOULKES
10 Representative of the State Controller

11 MILLICENT GOMES
12 Representative for the Director of the
13 Office of Planning and Research

14 JOHN S. LAZAR

15 WILLIAM SHERWOOD
16 Representative of the State Treasurer

17 FLOYD SHIMOMURA
18 Representative of the Department of Finance

19 JOANN STEINMEIER
20 School Board Member

21 COMMISSION STAFF

22 PAT HART JORGENSEN, Chief Legal Counsel

23 PAULA HIGASHI, Executive Director

24

25

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1 --o0o--

2 PUBLIC PRESENTATIONS:

3

4 JEFF BELL
Department of Finance

5 CAROL A. BERG, Ph.D., Executive Vice President
6 School Services of California, Inc.
and Education Mandated Cost Network

7 JACK B. CLARKE, JR., Attorney at Law
Best, Best & Krieger, LLP

8

9 PETER CERVINKA, Finance Budget Analyst
State of California Department of Finance

10 JAMES A. CUNNINGHAM, Legislative Mandate Specialist
San Diego City Schools

11

12 MARCIA FAULKNER
County of San Bernardino

13 RON FONTAINE, Director
Kern County Superintendent of Schools

14

15 GEOFFREY L. GRAYBILL, Deputy Attorney General
Office of the Attorney General

16 KEN HALL, Chairman of the Board
School Services of California

17

18 JAMES D. LOMBARD, Principal Program Budget Analyst
Department of Finance

19

20 LESLIE R. LOPEZ
Department of Finance

21

22 PAUL C. MINNEY, Attorney at Law
Girard & Vinson on behalf of
Mandated Cost Systems, Incorporated

23

24 JEANNIE OROPEZA, Principal Finance Budget Analyst
State of California, Department of Finance

25

26 KATHRYN RADTKEY GAITHER
State of California, Department of Finance

27

28 DIANA SMITH McDONOUGH, Shareholder
Lozano Smith, Attorneys at Law

DAN STONE, Deputy Attorney General
Representing the Department of Finance

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1 BE IT REMEMBERED that on Thursday, the 30th
2 day of March, 2000, commencing at the hour of
3 9:39 a.m., thereof, at the State Capitol, Room 126,
4 Sacramento, California, before me, Yvonne K. Fenner,
5 a Certified Shorthand Reporter in the State of
6 California, the following proceedings were had:

7 --o0o--

8 CHAIRPERSON ANGELIDES: I'd like to call to
9 order the meeting of the Commission on State Mandates,
10 and let's start with the roll call, please.

11 MS. HIGASHI: Mr. Beltrami.

12 MR. BELTRAMI: Present.

13 MS. HIGASHI: Mr. Chivarro.

14 MR. CHIVARRO: Present.

15 MS. HIGASHI: Ms. Gomes.

16 MS. GOMES: Here.

17 MS. HIGASHI: Mr. Lazar.

18 MR. LAZAR: Present.

19 MS. HIGASHI: Ms. Steinmeier.

20 MS. STEINMEIER: Here.

21 MS. HIGASHI: Ms. Porini is on vacation today.

22 And Mr. Angelides.

23 CHAIRPERSON ANGELIDES: I'm here, I think.

24 Good, we have a quorum.

25 And what I'd like to do first, though, is
26 welcome -- before we go to Item 10, I'd like to welcome
27 a very longtime friend of mine and a new member of the
28 Commission, Mr. John Lazar, who is a member of the

1 Turlock City Council. And it's great to have you here
2 today.

3 MR. LAZAR: Thank you.

4 CHAIRPERSON ANGELIDES: Is Turlock still the
5 turkey capital of the world?

6 MR. LAZAR: It is. It is, fortunately or
7 unfortunately.

8 CHAIRPERSON ANGELIDES: Now, how many of you
9 knew that? Come on, no one knew that? Well, you know
10 it now. Don't forget it. All right, good. Let's go to
11 Item No. 10.

12 MS. HIGASHI: Item No. 10 is the Executive
13 Director's Report.

14 CHAIRPERSON ANGELIDES: Correct.

15 MS. HIGASHI: And one of the items in this
16 report is the report on the special education
17 negotiations. You may recall that the parties to the
18 special education test claim signed an agreement with
19 the Commission agreeing to come back and report on the
20 status of negotiations. And the parties are here today,
21 and I'd like to invite them to come to the table to make
22 their report.

23 CHAIRPERSON ANGELIDES: All right.

24 MS. HIGASHI: Will each of you state your names
25 for the record and mention them before you start your
26 presentations.

27 CHAIRPERSON ANGELIDES: Ms. Higashi, are you --
28 did you want them up here at one time or --

1 MS. HIGASHI: That's what we do.

2 CHAIRPERSON ANGELIDES: So they can all be close
3 together. Let's see, Ms. Higashi, do you have any
4 preference about with whom we lead?

5 MS. HIGASHI: Usually Mr. Clarke starts.

6 MR. CLARKE: I'll be happy to. My name is Jack
7 Clark. I represent --

8 CHAIRPERSON ANGELIDES: Can we have everyone
9 identify themselves for the record, also.

10 MR. CLARKE: Certainly. My name is Jack Clarke,
11 C-l-a-r-k-e. I represent the Riverside County
12 Superintendent of Schools.

13 MS. McDONOUGH: My name is Diana McDonough. I
14 represent the supplemental claimants and appear also on
15 behalf of the Education Mandated Cost Network and the
16 Education Legal Alliance.

17 MS. RATDKEY GAITHER: Kathryn Gaither,
18 Department of Finance.

19 MR. STONE: Dan Stone with the Attorney
20 General's Office, also for the Department of Finance.

21 CHAIRPERSON ANGELIDES: All right. Let's roll.

22 MS. McDONOUGH: The Commission, as Ms. Higashi
23 noted, asked us to report back on negotiations, and we
24 have with us two of our negotiating team --

25 CHAIRPERSON ANGELIDES: Can you just speak up
26 just a little because of the -- you know, those people
27 who are concerned about gas prices are driving a lot.

28 MS. McDONOUGH: Okay. We are not honking right

1 now in deference to this esteemed body. Ken Hall and
2 Bill Whiteneck are here, who are members of our
3 negotiating team, to report directly to the Commission
4 on the efforts that have been made to date. So I'd like
5 to defer to them.

6 CHAIRPERSON ANGELIDES: All right.

7 MR. HALL: Mr. Chairman, Members of the
8 Commission, I'm Kenneth Hall, H-a-l-l. I'm chairman of
9 the board for School Services of California, and you may
10 have met my colleague on many occasions, Carol Berg,
11 that also is -- represents the Education Mandate Cost
12 Network. And with me is Bill Whiteneck, and two of us,
13 along with a third colleague that is unable to be here
14 today, Owen Waters (phonetic), have had an opportunity
15 to meet with the administration over the course of the
16 last several months, and we have had five meetings with
17 the Director of the Department of Finance, who has been
18 the designated negotiator on behalf of the
19 administration.

20 Let me first share with the Commission, we
21 appreciate the fact that this is a very significant
22 issue, and we felt it would be best if we made an oral
23 report to you this morning, rather than providing
24 written testimony as you had earlier requested as of
25 March 15th and appreciate your deference for our oral
26 report.

27 We would like to share with you first our
28 appreciation for your willingness to defer this issue

1 until we did have an opportunity to discuss this at
2 length with the administration, and we do appreciate the
3 opportunity to visit with the Director of the Department
4 of Finance and his staff regarding the issues that face
5 the education community and are before this Commission.

6 Over the course of those negotiations, we have
7 had some very frank and -- but very courteous and --
8 and, from our point of view, appreciative negotiations
9 and a full -- just full review of the administration's
10 position on this issue. And we believe that they have,
11 as well, heard a full review of our position on the
12 issue.

13 Unfortunately, after the -- those five meetings,
14 we do conclude that there are such philosophical
15 differences between the parties that we hereby call on
16 the Commission to put back on your agenda the
17 consideration of parameters and guidelines at your next
18 meeting. While we're -- while we will look forward to
19 continuing our discussions with the administration, we
20 do not believe that they are likely to be productive.
21 We do not believe at this point that we have sufficient
22 response from the administration to give us any in-depth
23 ability to be able to assure you that over the course of
24 these six months that you had set aside that the
25 negotiations are going to reach conclusion.

26 In general, we, as an education community have
27 approached this, we feel, with an open mind and a review
28 of the numbers from the Department of Finance that they

1 used in testimony to the Commission earlier, and as
2 you're aware, the Department of Finance has -- has
3 shared with you and shared with us that those numbers
4 that they have used in earlier testimony were the
5 outside numbers and they -- those numbers should not be
6 used as evidence and as basis for any resolution of
7 this -- of this issue.

8 As a consequence, the three of us as negotiators
9 decided that it would be best if we could provide
10 assistance to the parties by asking the education
11 community to take your staff's parameters and guidelines
12 and develop cost estimates of what would be those costs
13 if they had -- those costs of those eight mandate claims
14 for 1998, '99. We did meet over several weeks with
15 representatives of a good sampling, we believe, of SELPA
16 administrators and assisted them in going through the
17 parameters and guidelines as proposed by your staff for
18 the development of a statewide number.

19 We did use and did develop that number that we
20 thought had significant integrity to it, and we have
21 shared those numbers with the administration. And
22 unfortunately, the response that we have received back
23 is that our numbers are not acceptable to the
24 administration and, no, that it does not seem
25 appropriate for them to return with their own numbers.

26 As a consequence --

27 CHAIRPERSON ANGELIDES: Repeat that last phrase,
28 Mr. -- I realized my mute was on before, lucky you.

1 Would you repeat the last phrase, please.

2 MR. HALL: Sure. We did develop a statewide
3 number that we thought would be a measurement of the
4 costs of this issue and the parameters and guidelines as
5 proposed by your staff. Unfortunately that number was
6 not acceptable to the administration, and they have not
7 responded with a -- with a return number.

8 CHAIRPERSON ANGELIDES: I'm not going to let you
9 finish but for this one question: Would you
10 characterize the rejection of those numbers as -- or the
11 nonresponse to those numbers not acceptable as to
12 methodology or as to the amount owed?

13 MR. HALL: We have -- there has never been any
14 full discussion of our methodology, and thus no
15 rejection of our methodology. The rejection of our
16 numbers have primarily been based upon an issue that
17 you're well aware of relative to the question of an
18 offset. The administration still does believe -- and
19 they need to speak for themselves --

20 CHAIRPERSON ANGELIDES: The bottom line is put
21 an offer forward, which was rejected.

22 MR. HALL: That's correct.

23 CHAIRPERSON ANGELIDES: All right.

24 MR. HALL: And it was -- and it was rejected
25 based upon the fact that our numbers do not include an
26 offset.

27 Based upon that, we have shared with the
28 Director of the Department of Finance that they're

1 willing to continue to meet. We will be very pleased at
2 any time they do have a proposal for us to sit down and
3 visit further. But in view of the conclusions of the
4 administration, we do believe that it is appropriate for
5 this Commission to move forward with consideration of
6 the parameters and guidelines.

7 CHAIRPERSON ANGELIDES: Mr. Whiteneck.

8 MR. WHITENECK: Bill Whiteneck,
9 W-h-i-t-e-n-e-c-k, one of the negotiators for the
10 claimant. I'd only like to make a couple of points in
11 addition to what Ken said.

12 During these months that we've had discussions
13 with the administration, I want to emphasize that
14 attorneys for both sides have met, advised us, and the
15 various complicated legal issues that were involved, and
16 we think there was excellent progress on that front. We
17 had discussions about technically how we could pull this
18 off, both within your accepted process, not disrupting
19 any of your precedents, and how do you do something like
20 this where you've got to get sign-off among a lot of
21 school districts, et cetera. We don't think there are
22 any obstacles there that can't be overcome, so we were
23 very optimistic procedurally on how we could technically
24 pull this off and very optimistically -- optimistic
25 legally that it could be pulled off as well as within
26 statutory changes that would be necessary.

27 Those optimistic views were dampened by the
28 rejection of the proposal of the dollar level that we

1 put forward. So that led us to the conclusion that we
2 think you ought to have a parallel process. The
3 Commission ought to go forward with your process, and we
4 would be willing to stay as negotiators as the
5 administration cares to sit down with us and talk about
6 any and all areas, whether it's legal, technical,
7 legislative, or dollar levels and how the settlement
8 could be arrived at on a dollar basis, how it could be
9 paid.

10 So we're very willing to meet any time they want
11 us to come forward and -- but we want to impress upon
12 you that we think that the process right now ought to be
13 parallel. You ought to reconsider -- you ought to
14 consider what you need to do to continue your process,
15 and we're willing to continue with ours as well.

16 CHAIRPERSON ANGELIDES: Are there -- just a
17 couple quick comments before we move to the Department,
18 and I don't know if any of the other members want to ask
19 questions. Are you done, Mr. Whiteneck?

20 MR. WHITENECK: Yes.

21 CHAIRPERSON ANGELIDES: Let me just -- my
22 understanding is, just to be clear here, from what
23 you've said today and my other conversations I've had is
24 that good progress on the process or to give the analogy
25 of the Vietnam peace talks, good progress on the shape
26 of the table and who sits at it and the legal structure
27 of any conclusion. Very poor progress on beginning to
28 move to a real discussion of a settlement amount, both

1 historic and going forward, correct?

2 MR. HALL: That's correct.

3 CHAIRPERSON ANGELIDES: And when you really boil

4 it down, an offer has been made and rejected -- first

5 offer? Only one so far?

6 MR. HALL: No, there's been a series of

7 statistical discussions. This was the one that had the

8 most analytical integrity to it, I would suggest.

9 CHAIRPERSON ANGELIDES: Okay. But in the end,

10 one -- one offer that you felt was analytically

11 acceptable, an offer made and rejected and no

12 counteroffer, correct?

13 MR. HALL: Correct.

14 CHAIRPERSON ANGELIDES: All right.

15 Members of the Commission, before we move on to

16 the Department of Finance, any questions? Comments?

17 All right, let's go on to the Department of

18 Finance.

19 MR. STONE: Good morning. Dan Stone with the

20 Department of Finance. It's certainly our understanding

21 pursuant to the agreement that all parties signed, that

22 either party can come before the Commission and ask to

23 put the --

24 CHAIRPERSON ANGELIDES: Hold on a second. I'm

25 sorry, go ahead. Actually, would it help if I

26 threatened both parties with being placed in the room

27 with the -- the gas people could all come in and like

28 that old Woody Allen film where he kept the baby like in

1 the basement with the insurance agent until you come out
2 and make a deal? Go ahead.

3 MR. WHITENECK: My pickup only gets eight miles
4 to the gallon.

5 MR. STONE: Under the stipulation, Mr. Chairman,
6 either party can, if they wish, ask the Commission to
7 put the parameters and guidelines back on calendar, I
8 believe on 30 days' written notice is the -- is the
9 requirement per the stipulation. And certainly that's
10 the right of the claimants in this situation.

11 On behalf of the Department, I wanted to report
12 that there were several meetings. Discussions have been
13 significant. We're plainly not yet to a point of
14 agreement. But the Department has continued hope that
15 resolution can be achieved within the context of these
16 negotiating sessions, and we feel it would be very much
17 worthwhile for all parties if the discussions were
18 pursued.

19 With respect to the details, it's our preference
20 to leave those matters, leave the various issues not yet
21 resolved for discussion and resolution in the context of
22 bargaining. We wouldn't like to negotiate before the
23 public or before the Commission or in the media at this
24 point, so as far as specific details of offers and
25 counteroffers and what's been achieved, at this point
26 we're not prepared to discuss those.

27 But we do wish to indicate that we have been
28 willing and we have engaged in discussions and look

1 forward to further discussions, if that's acceptable to
2 the other party.

3 CHAIRPERSON ANGELIDES: Any other comments from
4 Finance? All right. Let's go to questions, comments of
5 Commission members.

6 Actually, let me see, is there anyone else who
7 wants -- Ms. Higashi, how does public comment work in
8 this context? I mean, I'm all for it, anyone else, but
9 you tell me procedurally.

10 MS. HIGASHI: Procedurally, we can accept public
11 comment.

12 CHAIRPERSON ANGELIDES: Are there any members of
13 the public who wish to comment on this matter? All
14 right.

15 MS. STEINMEIER: Now?

16 CHAIRPERSON ANGELIDES: Yes.

17 MS. STEINMEIER: Thank you, Mr. Chairman. I
18 guess I'm a little discouraged to hear that potentially
19 negotiations are stalled, I guess that's what I -- at
20 least I guess that's basically what the claimants are
21 telling us. And that -- I was very, very hopeful that
22 that wouldn't happen, although in any negotiation
23 process there are always these kinds of fits and starts
24 in negotiations. Anybody who's been through it knows
25 that.

26 As far as the proposal to begin a parallel
27 process, I would like to see us do that. I'm not sure
28 if we want to do in 60 -- in 30 days or in 60 days.

1 Mr. Hall was not specific about that, but certainly by
2 April or May I would like us to begin to move this
3 forward in a parallel way.

4 Not that I'm discouraged. I don't -- I think
5 there's still a possibility, and I am very hopeful that
6 a conclusion would be drawn, but at the same time the
7 Commission has a responsibility to eventually -- to get
8 our piece done. So that's my proposal, that we look at
9 either 30 days or 60 days from now putting it on our
10 agenda to begin to move forward.

11 CHAIRPERSON ANGELIDES: Right.

12 Additional members of the Commission?

13 MR. BELTRAMI: Chairman, from the testimony I
14 don't know if we're stalled or not. One half of the
15 group seems to feel that it's stalled, and I thought I
16 heard Mr. Stone say that some progress had been made.

17 MR. STONE: Well, I think both parties --

18 MR. BELTRAMI: -- recommending that we continue
19 this or not? Are we stalled or not?

20 MR. STONE: Well, I can't speak for the other
21 side, obviously, but our feeling is that the discussions
22 have been fruitful, at least to some extent. There are
23 certainly still differences, in some cases wide
24 differences, but it's our position that the discussions
25 are worth pursuing.

26 CHAIRPERSON ANGELIDES: All right. Further --
27 Mr. Chivarro.

28 MR. CHIVARRO: Yes. Just one point of

1 clarification. Mr. Stone, you suggested that by
2 stipulation the Commission cannot move forward until
3 either party provides written notice, 30 days' written
4 notice, is that --

5 MR. STONE: Yeah. I gather the Executive
6 Director has the stipulation before her. That's my
7 understanding, yes.

8 MR. CHIVARRO: So then a question of the staff,
9 so could we put this on and move forward without the 30
10 days' written notice?

11 MS. HIGASHI: The paragraph is that the parties
12 agree that if the negotiations are ineffective in the
13 view of any party, the party may recalendar the hearing
14 to take place prior to June 29th upon 30 days' written
15 notice. 30 days', the next hearing is set for
16 April 27th.

17 CHAIRPERSON ANGELIDES: So we can't --

18 MS. HIGASHI: We can't do it in April.

19 CHAIRPERSON ANGELIDES: All right. Okay. Any
20 additional comments or questions, Mr. Chivarro?

21 MR. CHIVARRO: No.

22 CHAIRPERSON ANGELIDES: All right. Let me --
23 let me make a couple. Everyone else done here? Great.
24 Let me make a couple observations.

25 First of all, I appreciate the efforts that have
26 been made to date, and let me just say that no one
27 should expect that what has taken 19 years to germinate
28 will be easy to resolve. And I don't think the

1 expectation ought to be that it will be easy to occur.

2 And therefore, you know, I'm inclined to say
3 publicly that I want both parties to work as hard as
4 they can -- not to say that, you know -- not without
5 judgment as to who's been doing their bit here to re --
6 re -- to reach resolution on this matter.

7 First, for the long-term fiscal stability and
8 predictability of state government, because I'm a big
9 believer that if this goes all the way through
10 litigation, we're going to get unintended consequences
11 and results and impacts and perhaps in a budget year
12 when it's least desirable. First for that reason and,
13 equally important, to ensure that children in this state
14 who are entitled to special education services receive
15 the proper level of services and that districts are
16 compensated for providing those.

17 My expectation as a member of this Commission,
18 the chair for this moment, is that both parties work
19 very hard in the next 60 days to bring this to
20 resolution. And it's not my intent as a member of the
21 Commission to assign the negotiating parties or the
22 school districts, for example, to extended purgatory,
23 but I do hope that both parties continue.

24 I appreciate that an offer has been put on the
25 table, and I'm very hopeful that the administration -- I
26 mean, I will not sit here and try to dictate negotiating
27 strategy for either party. But I hope that the parties,
28 including the administration, think about how to

1 reasonably resolve this matter and do what they need to
2 do to get these negotiations fully going.

3 Now, I can't tell you whether it comes in the
4 form of a counteroffer or what form that comes in, but
5 I'm very hopeful that the administration will proceed in
6 a way that will lead to stability in the long term
7 fiscally and, secondly, adequate funding for special
8 education services.

9 I was actually going to suggest that we do 60
10 days because I'm also familiar with the fact there's a
11 dance called the budget process, and we may have a
12 revised out the first week of May. And while these
13 issues are separate in that one's historical, the
14 resolution of this matter, and the other is current year
15 budget, clearly the availability of resources may well
16 figure into this resolution.

17 So what is our May date?

18 MS. HIGASHI: The May date is the 25th.

19 CHAIRPERSON ANGELIDES: May 25th. Well, do we
20 need a motion to schedule this or do we need the letter?

21 MS. HIGASHI: We need to receive the letter in
22 writing.

23 CHAIRPERSON ANGELIDES: All right. Upon receipt
24 of the letter, we'll schedule this for May 25th.

25 And I do want to say, you know, because I'm not
26 in the negotiating room, I just want to say one more
27 time how strongly I believe it is in the interests, not
28 only of the school districts, but the administration and

1 the State of California to bring this matter to a fair
2 resolution for the matter of predictability.

3 And I also want to say that the best public
4 policy result comes from people familiar with the
5 programs, programmatic needs, fiscal needs of the State,
6 sitting down in an intelligent way, and resolving this,
7 not from an extended court process where the result may
8 be one based on the letter of the law, but may not bear
9 the best relationship in the end to the State's fiscal
10 needs and needs of special education children in the
11 state. So that is an urging, a strong urging for the
12 resolution of this matter.

13 Any other comments from Commission members?

14 All right. Hearing none --

15 MR. HALL: Thank you, Mr. Chair.

16 CHAIRPERSON ANGELIDES: -- we will see you
17 May 25th.

18 MR. WHITENECK: Thank you for your time.

19 CHAIRPERSON ANGELIDES: Mr. Sherwood?
20 Mr. Sherwood? Or is Mr. Shimomura going to take over?

21 MS. HIGASHI: Could we just take a --

22 CHAIRPERSON ANGELIDES: Why don't we take a
23 short -- a short break.

24 (Recess taken.)

25 MS. HIGASHI: Okay. We're ready to start again.
26 I'd like to announce that Mr. Angelides has been
27 replaced by Mr. Sherwood and Mr. Shimomura is here to
28 represent Mr. Gage, Director of the Department of

1 Finance. I'd like to continue with Item 10 since --

2 CHAIRPERSON SHIMOMURA: Okay. This is with the
3 Executive Director's report.

4 MS. HIGASHI: Item 10, the workload data, is
5 displayed. We continue to have a few new filings each
6 month. Our workload in terms of the incorrect reduction
7 claims is still there. We're working with parties in an
8 attempt to move through these very expeditiously to
9 enable an appropriation to be made this year regarding
10 the Open Meetings Act claims, and we're also working to
11 put together a hearing calendar that will take us into
12 the year 2001 to schedule out all of the pending test
13 claims before the Commission. And we're doing this in
14 anticipation of success if the Governor's budget goes
15 through. We have one more committee to go through, and
16 that will be at the end of this month or of next month,
17 so we are hopeful and soon the backlog will be
18 eliminated, we hope.

19 MS. STEINMEIER: Excuse me if I chuckle.

20 MS. HIGASHI: The Local Claims bill, as all of
21 you know, has been introduced, and it's SB 1894. A copy
22 of it is in the binders. And it has blanks in it, and
23 the blanks will be filled in with the statewide cost
24 estimates as they are adopted during the next three
25 meetings.

26 There are two bills that were introduced this
27 year that affect the Commission on State Mandates. One
28 is SB 1982. It's part of CSAC's fiscal reform package.

1 And the hearing on that bill is set for next week in the
2 Local Government Committee.

3 There's another bill that is being carried by
4 Assembly Member Dave Cox, former Commission member, and
5 that bill is AB 2624. That bill addresses many more of
6 the Government Code provisions which affect the
7 Commission on State Mandates and the State Controller's
8 Office. We have attended one meeting -- I should say
9 now we have attended two meetings with sponsors of the
10 legislation, and we understand that additional drafting
11 will be done and amendments will be forthcoming. That
12 bill will also be heard next week in the Local
13 Government Committee.

14 In terms of rulemaking, tomorrow morning staff
15 is convening a workshop to review the pending rulemaking
16 proposals and dismissals and the cleanup amendments to
17 implement last year's legislation. That workshop will
18 begin at 9:00 a.m., and the notice of it was included
19 within the agenda.

20 Regarding the Commission's offices, it is really
21 going to happen. We are going to move. And the move
22 will take place, if the contractors come through with
23 the schedule, the weekend right after the April hearing.
24 So by May 1 we will be in our new offices. We will
25 continue to keep everyone posted on that, updating the
26 website and sending notifications to parties as soon as
27 we know that that is a very hard and fast move date.

28 CHAIRPERSON SHIMOMURA: And where will the new

1 offices be?

2 MS. HIGASHI: The new offices will be at 980
3 Ninth Street. It's the U.S. Bank Plaza building across
4 from the park. We'll be on the third floor. And the
5 construction is under way right now.

6 CHAIRPERSON SHIMOMURA: Will we have to get new
7 phone numbers and other things?

8 MS. HIGASHI: We don't think so. I think --

9 CHAIRPERSON SHIMOMURA: So people can still call
10 the same number and get the --

11 MS. HIGASHI: Right. And we assume -- we expect
12 the AG's office will forward our mail. Unless they want
13 to forward it to the Government Law section or
14 something, but.

15 And we would anticipate that we would probably
16 not want to have an open house until right around the
17 May hearing, so that will be an interesting month.

18 The proposed agenda for next month includes a
19 test claim filed by the County of Los Angeles called
20 Severely Emotionally Disturbed Students, and then it
21 would also include proposed statements of decision and
22 also the dismissal of the special education test claim
23 filed by the Santa Barbara County Superintendent of
24 Schools.

25 Statewide costs, there will be at least one
26 statewide cost estimate. And we also anticipate
27 scheduling the review of the State Controller's pending
28 instructions request filed by the San Diego Unified

1 School District.

2 Are there any questions?

3 CHAIRPERSON SHIMOMURA: Yes.

4 MS. STEINMEIER: One question, Paula. On the
5 dismissal of the special education test claim filed by
6 Santa Barbara, I understand -- I know I've been away for
7 a couple of months, so could you update us on where we
8 are on this? Because I know there were parts of that
9 claim that still may be alive, so what's going on?

10 MS. HIGASHI: What happened here -- I believe it
11 was probably one of the meetings that you were unable to
12 attend, but the Commission staff had previously agendaed
13 a partial dismissal of the Santa Barbara test claim.
14 The Commission requested that it be renoticed and
15 scheduled as a complete dismissal of the Santa Barbara
16 test claim, and we have noticed the parties. Basically
17 we have -- we have followed the request that was made by
18 Long Beach Unified School District and notified every
19 school district in the state that this item would be set
20 for dismissal.

21 MS. STEINMEIER: That doesn't mean that that
22 will necessarily be the end result. I mean, the
23 Commission could still --

24 MS. HIGASHI: Right. The Commission could
25 choose to do a complete or a partial, as was the
26 original proposal.

27 MS. STEINMEIER: Thank you.

28 MS. HIGASHI: But by scheduling it this way, the

1 Commission has the flexibility.

2 MS. STEINMEIER: Thank you.

3 CHAIRPERSON SHIMOMURA: Any other questions or
4 comments? If none, I'd like to thank the -- Ms. Higashi
5 for her report.

6 So why don't we go back on to the agenda and
7 talk about the approval of minutes.

8 MS. HIGASHI: Item 1, proposed minutes for the
9 February 24th meeting.

10 CHAIRPERSON SHIMOMURA: Is there a motion to
11 adopt the Item 1, February 24th minutes?

12 MR. SHERWOOD: I'll move for approval.

13 MS. GOMES: Second.

14 CHAIRPERSON SHIMOMURA: It's been moved and
15 seconded. All those in favor?

16 MULTIPLE SPEAKERS: Aye.

17 MS. STEINMEIER: I have to abstain,
18 Mr. Shimomura.

19 CHAIRPERSON SHIMOMURA: And I also will abstain.

20 MS. HIGASHI: Mr. Lazar, do you want an
21 abstention on the February minutes?

22 MR. LAZAR: I said aye. Can I not vote?

23 MS. HIGASHI: Yes.

24 MR. LAZAR: Okay. Thank you.

25 MS. HIGASHI: You're an abstention.

26 MR. LAZAR: I'm a rookie, okay?

27 MS. HIGASHI: This takes us to Item 2. And
28 Item 2 is the minutes of the March 7th meeting. And --

1 CHAIRPERSON SHIMOMURA: Is there a motion to
2 adopt the minutes of the March 7th meeting?

3 MR. BELTRAMI: Mr. Chairman, I'd just like
4 clarification, was Mr. Lazar at that meeting?

5 MS. HIGASHI: Yes, Mr. Lazar was at that
6 meeting.

7 MR. BELTRAMI: Oh, okay. Yeah.

8 MS. HIGASHI: That was the day we met him.

9 MR. LAZAR: I heard your voice on the phone,
10 remember?

11 MR. BELTRAMI: Yes, that's right.

12 MS. STEINMEIER: How could we forget,
13 Mr. Beltrami?

14 MR. SHERWOOD: I'll move for approval.

15 MR. BELTRAMI: Second.

16 CHAIRPERSON SHIMOMURA: It's been moved and
17 seconded. All those in favor?

18 MULTIPLE SPEAKERS: Aye.

19 CHAIRPERSON SHIMOMURA: Opposed? Abstain?
20 I'll abstain.

21 MS. HIGASHI: This brings us to the proposed
22 consent calendar. The proposed consent calendar
23 consists of adoptions of two statements of decision,
24 School Crimes Reporting II, which is Item 5, and Item 7,
25 Requests for Removal from the State Mandates
26 Apportionment System, Developmentally Disabled Attorney
27 Services.

28 It also includes Items 8 and 9, adoption of two

1 proposed statewide cost estimates, Seismic Safety
2 Retrofit Program and Very High Fire Hazard Severity
3 Zones. We've received no indication of opposition to
4 these items being on the consent calendar.

5 CHAIRPERSON SHIMOMURA: Okay. Just to clarify,
6 so Item 6, the SEMS, is being pulled off the consent?

7 MS. HIGASHI: Right. It's not on the consent.

8 CHAIRPERSON SHIMOMURA: Because it's reported
9 that way in the proposed agenda.

10 If there's no objection, could we have a roll
11 call vote on this.

12 MS. HIGASHI: Mr. Beltrami.

13 MR. BELTRAMI: Yes.

14 MS. HIGASHI: Mr. Foulkes.

15 MR. FOULKES: Aye.

16 MS. HIGASHI: Ms. Gomes.

17 MS. GOMES: Aye.

18 MS. HIGASHI: Mr. Lazar.

19 MR. LAZAR: Aye.

20 MS. HIGASHI: Mr. Sherwood.

21 MR. SHERWOOD: Aye.

22 MS. HIGASHI: Ms. Steinmeier.

23 MS. STEINMEIER: Aye.

24 MS. HIGASHI: Mr. Shimomura.

25 CHAIRPERSON SHIMOMURA: Aye.

26 MS. HIGASHI: The motion's carried.

27 What I'd like to do next is to take some of
28 the -- to reorder the items for the hearings on test

1 claims. But before we do that, we'd like to have all of
2 the potential witnesses for these items please stand up
3 for their swearing in.

4 Do you solemnly swear or affirm that the
5 testimony which you're about to give is true and correct
6 based upon your personal knowledge, information, or
7 belief?

8 MULTIPLE SPEAKERS: Yes.

9 MS. HIGASHI: Thank you.

10 I'd like to start with Item 4, Involuntary
11 Transfers.

12 The test claim statutes require school districts
13 to adopt rules and regulations governing procedures for
14 the involuntary transfer of students to continuation
15 schools and opportunity schools, classes, or programs.

16 In 1997, the draft staff analysis on this test
17 claim was issued. That analysis recommended approval of
18 the requirement for continuation schools to adopt rules
19 and regulations and denial of the remaining portions of
20 the test claim. The claimant vigorously objected to
21 that part of the analysis that recommended denial based
22 on federal law and requested that it be withdrawn and
23 rewritten. The staff analysis before you has been
24 updated and revised to address issues raised by claimant
25 and to reflect the view of staff.

26 The staff analysis finds that prior law did not
27 require school districts to adopt specific rules and
28 regulations for the involuntary transfer of pupils to

1 continuation schools and opportunity schools, classes,
2 and programs. Therefore, staff concludes the test claim
3 statutes impose a new program or higher level of service
4 upon school districts within the meaning of section 6,
5 article XIII B of the Constitution, for the adoption and
6 implementation of these regulations.

7 The staff analysis considers whether the test
8 claim statutes impose costs mandated by the state or by
9 the federal government, examining the application of the
10 U.S. Supreme Court's decision in Goss v. Lopez.

11 Finally, the staff analysis presents the
12 Commission with two options. Option 1 for approval of
13 the test claim, the Commission, if it adopts Option 1,
14 would approve the claim based on the following findings:

15 An involuntary transfer of a pupil to a
16 continuation school, opportunity school, class, or
17 program does not deprive that pupil of his or her
18 property right to an education and does not exclude that
19 pupil from school.

20 Therefore, the requirements to adopt the
21 prescribed regulations for the involuntary transfers
22 result in a new program or higher level of service under
23 section 6, XIII B of the Constitution and impose costs
24 mandated by the State upon school districts pursuant to
25 Government Code section 17514.

26 Alternatively, the Commission may partially
27 approve this test claim based on Option 2. Option 2
28 would be based on one of the following findings: One is

1 regarding a property interest. If the Commission were
2 to make this finding, it would approve -- partially
3 approve this test claim based upon the findings that an
4 involuntary transfer of a pupil to a continuation
5 school, opportunity school, class, or program, deprives
6 that pupil of his or her right to an education and, in
7 fact, excludes that pupil from school.

8 Therefore, due process requires the pupil
9 receive oral or written notice of the charges against
10 him or her and if he or she denies them, the pupil is
11 entitled to an explanation of the district's evidence
12 and an opportunity to present his or her side of the
13 story. Any requirements in excess of these minimal
14 requirements would impose costs mandated by the State
15 upon school districts pursuant to Government Code
16 section 17514. And this finding would be based on
17 *Goss v. Lopez*.

18 The other finding is one which is less clear for
19 me, and that is one based on the liberty interest. And
20 the *Goss* case also describes liberty interests where the
21 Commission could find -- and the staff analysis points
22 out this would have to be based on additional testimony
23 or evidentiary support -- that an involuntary transfer
24 could seriously damage a pupil's standing with fellow
25 pupils and teachers and interfere with later
26 opportunities for his or her education and employment.

27 Therefore, due process requires the pupil
28 receive notice and an opportunity to refute the charges.

1 Accordingly, requirements in excess of these minimal
2 requirements would impose costs mandated by the State
3 upon school districts pursuant to Government Code
4 section 17514.

5 Based on the staff's review of the test claim,
6 the draft staff analysis, and comments filed by the
7 claimant, staff concludes and recommends the Commission
8 approve this test claim based on Option 1.

9 I'd like to update you as well. During the last
10 ten days, we have received the following documents: On
11 March 22, the claimant filed a letter in support of
12 Option 1 and also included case law in opposition to
13 Option 2. These materials were distributed to the
14 Commission members last Friday.

15 On March 27th, Mr. Paul Minney filed a letter in
16 support of Option 1, and it's a very brief letter. I
17 have copies here -- about two sentences. So these
18 letters are also available to you.

19 And then last night at about 4:58 we received
20 notice from the Department of Finance of an incoming
21 fax, which would request an extension of time. At 5:02
22 the Commission received this fax, and we'll distribute
23 these right now.

24 Would the parties state their names for the
25 record.

26 DR. BERG: Carol Berg, Education Mandated Cost
27 Network.

28 MR. CUNNINGHAM: Jim Cunningham, with the San

1 Diego Unified School District, test claimant.

2 MR. MINNEY: Paul Minney with Girard and Vinson
3 on behalf of Mandated Cost Systems, Incorporated.

4 MR. BELL: Jeff Bell, Department of Finance.

5 MS. OROPEZA: Jeannie Oropeza, Department of
6 Finance.

7 CHAIRPERSON SHIMOMURA: Okay. Why don't we
8 start out by asking the Department of Finance why they
9 think that this thing should be continued.

10 MR. BELL: Yes. We're asking an extension of
11 the test claim because the analysis has recently changed
12 and we'd like more time to respond to the new Commission
13 staff analysis. We would note also that we did call on
14 Friday the 24th to notify them that we would be
15 requesting an extension. And since we haven't had
16 enough time yet to fully review their revised analysis,
17 we think that we need more time to appropriately
18 represent the interests of the State.

19 CHAIRPERSON SHIMOMURA: And by that you're
20 talking about some kind of previous analysis? Are you
21 talking about the 1997 proposed decision?

22 MR. BELL: That is the draft analysis from 1997;
23 that is correct.

24 MS. OROPEZA: We're actually talking about their
25 recent analysis that we haven't had an opportunity to
26 take a look at in comparison to what they did back in
27 1997. We actually received that a week ago, on the
28 20th. And because of staff turnover and so forth, the

1 staff that even worked on the 1997 analysis is no longer
2 with us, and so we need an opportunity to look at the
3 previous '97 analysis in comparison to the latest
4 Commission analysis.

5 CHAIRPERSON SHIMOMURA: Well, do the school
6 district people have any comment just on this question
7 of more time?

8 MR. CUNNINGHAM: We also have had a very short
9 turnaround time. You're looking at the staff of the San
10 Diego Unified School District on this, and I had an
11 opportunity to turn around my comments in a couple of
12 days. The Commission staff notified the Commission and
13 all the parties last month that this item was scheduled
14 for April, and I would assume that the Department of
15 Finance, like I did, went back through the '97 analysis
16 in preparation for that before the draft for the final
17 staff analysis came out. So we would ask that the
18 Commission not approve that request and that we hear the
19 matter today.

20 CHAIRPERSON SHIMOMURA: Discussion by the
21 members of the Commission on the question of extension
22 of time or should we just move ahead?

23 MS. STEINMEIER: I would like to proceed, Mr.
24 Shimomura. Millicent, did you --

25 MS. GOMES: Go ahead.

26 MS. STEINMEIER: Everybody was at the same
27 disadvantage. I mean, the '97 material was out there.
28 It's been out there for a while and laying there, so

1 everybody knew it was available. So I guess they're
2 both at the same disadvantage, so I would not be in
3 favor of postponing it for that reason, just because of
4 time.

5 MS. GOMES: I would tend to disagree, reason
6 being is I would like as much information as possible on
7 the entire issue. If there's additional information
8 that is coming to light that we can get another light
9 on, I would be open to an extension of time.

10 CHAIRPERSON SHIMOMURA: Any other comments?
11 Yes.

12 MR. FOULKES: Thank you, Mr. Chair. On behalf
13 of the Controller, I agree that this is a fairly
14 complicated issue and there have been some recent notes,
15 especially on the whole constitutional side of this. It
16 wouldn't hurt, at least from our office's standpoint, to
17 have more time to review, especially in light of
18 material that came out of the binder.

19 MR. LAZAR: May I say something? Just as a new
20 member, I think I would appreciate more time with it
21 also, so.

22 MR. SHERWOOD: I dislike putting this off
23 further. This has been happening more frequently, and
24 it bothers me that it is happening. I believe this last
25 report went out on the 15th of the month. You indicate
26 you got it on the 20th. I do want all the information
27 so, once again I find myself in the position I don't
28 want to make a decision on an important matter without

1 having both sides represented fully. So my tendency is
2 to go in that direction, to postpone, from my
3 standpoint, understanding that there has been a change
4 in the approach on this item from the prior in '97. So
5 I will very reluctantly agree with this.

6 MR. BELTRAMI: I agree with Mr. Sherwood.

7 MR. CUNNINGHAM: Mr. Chair? May I, as the
8 claimant, ask that the Department of Finance be given a
9 date specific to provide comments prior to the next
10 hearing so that we don't run into this same issue next
11 month?

12 CHAIRPERSON SHIMOMURA: So is it your request we
13 put it over to the next meeting?

14 MS. OROPEZA: We just needed more time to look
15 at and give you as much information as we could provide
16 so you can make an informative decision, so whatever
17 time you provide us is fine.

18 MS. HIGASHI: In order for this to make the next
19 hearing, we would need your comments by next Thursday or
20 Friday, and then that would give Jim a shorter
21 turnaround time so that we would actually receive both
22 sets of comments in time to put the analysis together
23 for provisions to be made in order for it to be on the
24 April agenda.

25 MR. CUNNINGHAM: Thank you.

26 CHAIRPERSON SHIMOMURA: Okay, so we'll put this
27 over to the next meeting.

28 MS. HIGASHI: Okay. The next item is Item 6.

1 MS. HART JORGENSEN: In the proposed statement
2 of decision, will the parties please come to the table.

3 In response to the devastation of the East Bay
4 Hills fire, SB 1841 was enacted adding article 9.5
5 entitled "Disaster Preparedness" to the Government Code.
6 This test claim legislation directs the Governor's
7 Office of Emergency Services, in coordination with all
8 interested state agencies involved in emergency
9 response, to establish by regulation the standardized
10 emergency management system for responding to and
11 managing emergencies and disasters involving multiple
12 jurisdictions.

13 While the test claim legislation and
14 implementing regulations do not specifically require
15 local agencies to adopt SEMS, failure to do so results
16 in a loss of funding for specified response-related
17 personnel costs.

18 The Commission on January 27th, 2000, and again
19 on February 24th, 2000, heard this test claim. On
20 February 24th, the Commission unanimously denied the
21 test claim finding that the application of the
22 Sacramento II and Hayes factors evidenced this test
23 claim legislation --

24 CHAIRPERSON SHIMOMURA: Could you speak up a
25 little louder. Unfortunately, we're competing with
26 the --

27 MS. HART JORGENSEN: On February 24th, the
28 Commission unanimously denied the test claim finding

1 that the application of the Sacramento II and Hayes
2 factors evidenced this test claim legislation and
3 implementing regulations are not coercive and that local
4 agencies adopting SEMs have freely chosen to do so.

5 If the Commission concludes that this attached
6 proposed statement of decision accurately reflects the
7 Commission's action taken at the February 24th hearing,
8 staff recommends that the Commission adopt the attached
9 proposed statement of decision.

10 CHAIRPERSON SHIMOMURA: What do we do if we
11 still like the conclusion, but the reason doesn't seem
12 like it's consistent with what we had in mind?

13 MS. HART JORGENSEN: At the prior meeting the
14 motion was to adopt staff's Option 2. And Option 2
15 provided that staff deny the decision by using the Hays
16 and Sacramento II factors, but I think I need to back up
17 before that. There were several options available for
18 the Commission on that. This was a rather complicated
19 hearing. The first phase was to determine whether or
20 not it constituted a new promise or higher level of
21 service. Then there was an analysis as to whether or
22 not it constituted a state mandate.

23 We heard input from Department of Finance. As
24 requested, they wanted the legislative analyst's office
25 to provide comments. Those comments were analyzed and
26 put into the record. And also the Department of Finance
27 had the AG's office put forth some of their thoughts on
28 that.

1 So there -- so if the threshold was that it was
2 a new program or higher level of service, the next
3 question was, was it cost mandated by the State. The AG
4 indicated that it could not be cost mandated by the
5 State because by doing this, you're using the definition
6 of cost mandated by the State found in federal -- in the
7 definition of federal mandate. The definition of state
8 mandate does not mirror that definition and does not
9 have the language talking about the coercion.

10 The legislative analyst's office set forth an
11 analysis indicating that there might be circumstances
12 under which you should look at the Hayes and
13 Sacramento II factors, which there is a state mandate to
14 determine whether or not there was coercion.

15 So then what happened at that last hearing,
16 there was some discussion -- there was no discussion
17 about the LIO approach or the Department of Finance
18 approach. So --

19 MS. GOMES: I know you're not done. I'm sorry
20 to interrupt. I would like to make a motion to have a
21 reconsideration of the vote based on that my
22 understanding was the Commission members were voting
23 whether or not SEMS was a state-mandated program or not,
24 not necessarily the application of those factors. So
25 based on that, I would request reconsideration of the
26 vote.

27 CHAIRPERSON SHIMOMURA: It's my understanding
28 that you were the person who made the motion at the last

1 meeting to adopt this approach.

2 MS. GOMES: Yes, I was, not realizing that the
3 recommendation included the Sacramento II and Hayes
4 factors as evidence. And I think that after all the
5 testimony was heard and the back and forth, that that
6 was sort of lost in its entirety as far as what Option 2
7 was, was to deny the test claim, not necessarily because
8 of those factors. So in that respect, I would ask for a
9 reconsideration of the vote.

10 CHAIRPERSON SHIMOMURA: There's a motion to
11 reconsider. Is there a second?

12 MS. STEINMEIER: To reconsider, yes, I'll second
13 that.

14 CHAIRPERSON SHIMOMURA: It's been moved and
15 seconded. Why don't we have some discussion on that.
16 You might just want to explain the reasons a little bit.

17 MS. GOMES: Actually, Pat, is that something
18 that we can do?

19 MS. HART JORGENSEN: Well, looking at Robert's
20 Rules, you can make that a motion to reconsider a vote.
21 You can vote on whether or not you will reconsider the
22 vote, but you cannot take a vote on the issue of whether
23 or not to approve or deny the test claim, because it's
24 not on the agenda. What we have on the agenda is a
25 motion to approve the statement of decision.

26 So, as I understand Millicent, what you're
27 saying is you don't -- when you made your motion, you
28 don't feel that -- that there were so many options that

1 were available, that you did not necessarily -- that you
2 did not -- you did not necessarily wish to deny it on
3 the basis of applying the Sacramento II and Hayes
4 factors.

5 MS. GOMES: Right. That's exactly what I'm
6 saying.

7 CHAIRPERSON SHIMOMURA: So is what you're saying
8 that procedurally we can't really take up the question
9 of reconsideration --

10 MS. HART JORGENSEN: You can.

11 CHAIRPERSON SHIMOMURA: -- for notice reasons or
12 can we?

13 MS. HART JORGENSEN: No, I'm sorry. What you
14 can vote on is whether or not to reconsider the vote
15 taken. Then we need to -- if that motion is approved,
16 then we need to put this on next month's agenda and then
17 there can be a discussion, and then we need a vote on
18 what the determination was, what the actual Commission's
19 vote is on the SEMS test claim.

20 MS. GOMES: I think one of my concerns is that
21 there wasn't necessarily a meeting of the minds in
22 respect as to why the denial of the claim was being
23 brought about, so I think this would be the best way to
24 handle the situation so that we could be more clear.

25 MS. STEINMEIER: As someone who didn't attend
26 the meeting, it wasn't clear to me. I mean, initially I
27 thought one thing and then I thought another thing. So
28 it wasn't clear and the record's not clear.

1 MS. GOMES: Right.

2 MS. STEINMEIER: This will have the effect,
3 though, of putting this off, you know. This decision,
4 we'll have to go back and backtrack ourselves. And I
5 don't see us reversing our basic decision, but we do
6 need some reasons. I mean, we didn't deny or approve
7 things without some sort of rationale. So for that
8 clarification purpose, again, I agree, let's backtrack.

9 MR. SHERWOOD: Then are we going to rehear from
10 the claimant or are we going to rehear this from the
11 standpoint of stating our -- concerning the factors,
12 different factors about why we came to the vote?

13 MS. HART JORGENSEN: It will be noticed for the
14 test claim for -- it will be an action item. And you
15 can ask for more testimony, if you would like. We'll do
16 the presentation of it. I mean, it will be the
17 re-presentation of the test claim. And the -- you can
18 do it like you're doing right now, you can make a
19 discussion and at that time you can take a vote. But
20 you can't take a -- if you make the move to reconsider,
21 that's all you can do today.

22 So as far as you can go is you can either say
23 that you're going to reconsider the vote, if you find
24 that, then it's scheduled for next month. If not, then
25 we'll go forward and then the next issue is whether or
26 not you approve the decision, as it's calendared for
27 today.

28 MS. HIGASHI: Let me just offer a bit of

1 history. The Commission has done this before when
2 during the special education process there was one part
3 of the test claim in which we had a request from the
4 State Board of Education after the hearing had been held
5 on it and after the members had voted to rehear it and
6 reconsider it. And the Commission did go through that
7 process, and this was all prior to adoption of the
8 statement of decision and nothing changed.

9 MR. SHERWOOD: And that's the key, am I right,
10 Paula, it was before the statement?

11 MS. HIGASHI: It was before the statement of
12 decision.

13 MR. SHERWOOD: Voting on it.

14 MS. HIGASHI: And basically what -- by taking
15 this action today, what you're saying is, in fact, this
16 doesn't accurately reflect the decision of the
17 Commission so we need to revisit it.

18 CHAIRPERSON SHIMOMURA: You know, I'd like to
19 hear -- if the members of the Commission don't have any
20 other comments at this point, I'd just like to hear the
21 viewpoints of the witnesses on just the question of
22 reconsideration, if any.

23 Have the witnesses identified themselves yet?

24 MS. FAULKNER: I'm Marcia Faulkner with the
25 County of San Bernardino, the test claimant.

26 MR. GRAYBILL: My name is Geoffrey Graybill.
27 I'm a deputy attorney general appearing as counsel to
28 the Department of Finance in this matter.

1 MR. LOMBARD: Jim Lombard, Department of
2 Finance.

3 MR. GRAYBILL: I just had, along with
4 Ms. Higashi's comments, just something to add. I think
5 it is probably within the purview of the Commission
6 today, if it is so disposed, if the -- what's before you
7 is the proposed decision and if the Commission decides
8 that does not reflect the decision they made, you can
9 instruct the staff, I think, at this meeting what
10 changes should be made in that proposed decision to
11 reflect what you did last time. I don't know that it
12 necessarily requires a motion for reconsideration of
13 what you did last time if the only issue you're dealing
14 with is whether what is written accurately reflects what
15 you did. And so you're just following through on a
16 decision that you made last time.

17 CHAIRPERSON SHIMOMURA: Ms. Jorgensen, do you
18 have a comment?

19 MS. HART JORGENSEN: Yes, if I may comment to
20 that. My understanding is that Ms. Gomes is indicating
21 that she made the motion. The motion she made was
22 specific. She specified staff's Option 2, which
23 indicated that that utilized Sacramento II and Hayes
24 factors. And I don't think there's any way that we
25 could correct the decision right now to say something
26 other, since the motion was so specific. So I think the
27 proper thing would be to do a reconsider -- ask for a
28 reconsideration of the vote, if there is going to be a

1 change. If that's not appropriate, then it is the
2 Sacramento II factors, but that was a motion that was --
3 that was the option that she -- that she indicated she
4 was following, and it was specific in the record.

5 MR. GRAYBILL: Well, I understand that it's
6 specific in the record. I've looked at the transcript.
7 But what is not clear are what the inferences -- what
8 the correct inferences to be drawn from that motion are.
9 There's a staff Option 2, but that was not -- it was not
10 specifically discussed in the context of the motion,
11 which particular inferences with regard to Option 2 or
12 because Option 2 by inference anyway refers back to some
13 analysis that the staff did but is not specifically
14 incorporated into Option 2 and that may not have been
15 the intention of the Commission when it adopted
16 Option 2.

17 MS. HART JORGENSEN: And that's why I say that I
18 think the motion was very specific referring to an
19 option that spelled out what the option would be. And I
20 have concerns if Ms. Gomes is indicating that's not what
21 her intention was, that I personally don't think we
22 could change it without going through and having a
23 hearing on the issue. That's all I'm concerned about.
24 This is not scheduled for a hearing. It's scheduled for
25 whether or not to adopt the statement of decision.

26 CHAIRPERSON SHIMOMURA: I'm inclined to follow
27 what Ms. Jorgensen's suggesting.

28 Do you have a comment?

1 MS. FAULKNER: Well, I was going to indicate
2 that I am concerned that there is a lot of confusion
3 over the reasons for the denial of the test claim, and
4 we appreciate it being very clear what the Commission's
5 reasoning was for that. Thank you.

6 CHAIRPERSON SHIMOMURA: Is there any other
7 comment? If not, I think we have before us a motion for
8 a reconsideration, in which case we would have to notice
9 it for the actual discussion at some different day.

10 MS. HART JORGENSEN: It's a reconsideration of
11 the vote.

12 CHAIRPERSON SHIMOMURA: Reconsideration of the
13 vote. Do we have to specify at this point when we want
14 to take it up again if we do --

15 MS. HART JORGENSEN: Oh.

16 CHAIRPERSON SHIMOMURA: -- vote to reconsider?

17 MS. HART JORGENSEN: We can schedule it.
18 There's no reason why we can't schedule it for next
19 month.

20 CHAIRPERSON SHIMOMURA: Okay. With that
21 understanding, may we have a roll call vote on this.

22 MS. HIGASHI: Mr. Foulkes.

23 MR. FOULKES: Aye.

24 MS. HIGASHI: Ms. Gomes.

25 MS. GOMES: Aye.

26 MS. HIGASHI: Mr. Lazar.

27 MR. LAZAR: Aye.

28 MS. HIGASHI: Mr. Sherwood.

1 MR. SHERWOOD: Aye.

2 MS. HIGASHI: Ms. Steinmeier.

3 MS. STEINMEIER: Aye.

4 MS. HIGASHI: Mr. Beltrami.

5 MR. BELTRAMI: Yes.

6 MS. HIGASHI: Mr. Shimomura.

7 CHAIRPERSON SHIMOMURA: Aye.

8 MS. HIGASHI: Motion carries. We'll set this

9 matter for the April hearing.

10 CHAIRPERSON SHIMOMURA: We're not getting much

11 done. When Annette gets back from the vacation, she'll

12 find it all still there waiting for her.

13 MS. HIGASHI: This brings us now to the

14 beginning of the test claim items, and that is Item 3,

15 School Site Councils and Brown Act Reform. This is a

16 test claim filed by Kern Union High School District and

17 San Diego Unified School District and the County of

18 Santa Clara. This item will be presented by Pat Hart.

19 MS. HART JORGENSEN: I see the parties are

20 coming to the table and I will try and speak loudly in

21 anticipation of a burst from the outside.

22 This test claim relates to the application --

23 CHAIRPERSON SHIMOMURA: Excuse me, Pat, before

24 we move on to that, at this point I'd like to ask to

25 pass the chair over to Mr. Sherwood. I'm going to

26 abstain from this matter and all the remaining matters

27 on the agenda. As to this specific Item 3, School Site

28 Council, I've been informed that many years ago when I

1 was at the Attorney General's Office, I guess I had some
2 involvement with this issue and even though I don't
3 remember a bunch of it at this point, I really think
4 that I ought to abstain. And also I really ought not to
5 participate in any of the executive session matters so
6 with that I'm turning it over to Mr. Sherwood.

7 MR. SHERWOOD: Thank you. Has everyone been
8 sworn in? I just wanted to make sure.

9 MS. HART JORGENSEN: Okay. This is Item 3,
10 School Sites Council.

11 This test claim relates to the application of
12 the open meeting provisions of the Brown Act to
13 specified school site councils and advisory committees
14 of school districts which are created by state or
15 federal law. While it is clear that the Brown Act has
16 applied to the governing bodies of the districts since
17 1962, it is unclear when these school site councils and
18 advisory committees created by state or federal law
19 became subject to the Brown Act.

20 Prior to the enactment of the test claim
21 legislation, the term "legislative body" was defined to
22 include any advisory commission, advisory committee, or
23 advisory board of a local agency created by the action
24 of a local agency. The test claim statute, Government
25 Code section 54592, expanded the definition of
26 "legislative body" to include any other local body
27 created by state or federal statute.

28 Section 54592 became effective on April 1st,

1 1994. Three months later, the second test claim
2 statute, Education Code section 35147, was enacted to
3 exempt the eight specified school site councils and
4 advisory committees from the Brown Act requirements,
5 only relative to special meetings, emergency meetings,
6 closed sessions, criminal and civil sanctions.

7 However, section 35147 retained the requirement
8 for school site councils and advisory committees to
9 prepare and post a notice and agenda describing each
10 item of business to be discussed or acted upon.

11 Staff finds that all of the school site councils
12 and advisory committees at issue were created by state
13 or federal statute and thus first became subject to the
14 Brown Act when Government Code section 54592 was amended
15 in 1993.

16 If the Commission disagrees with staff's
17 findings and determines that the school site councils
18 and advisory committees were subject to the Brown Act
19 prior to 1993, the Commission must continue its inquiry
20 to determine if the test claim legislation imposes any
21 additional activities or a higher level of service on
22 the school site councils and advisory committees.

23 Prior to the enactment of the test claim
24 legislation, section 54954.2 of the Brown Act required
25 all legislative bodies to prepare and post agendas.
26 However, during this same period, section 54952.3 of the
27 Brown Act only required advisory bodies subject to the
28 Act to provide notice of the meetings in their bylaws

1 or, I quote, "by whatever rule," quote/unquote, was
2 utilized by that body.

3 Despite that apparent conflict between these two
4 provisions, staff finds that based on the laws of
5 statutory construction, because section 54952.3 was
6 specific to the requirements of the advisory body, this
7 section should be interpreted as an exception to the
8 general rule that applied to all legislative bodies
9 subject to the Brown Act. Accordingly, it is staff's
10 conclusion that Education Code section 35147 imposes a
11 new program or higher level of service by requiring that
12 advisory bodies prepare and post agendas of their
13 meetings.

14 Staff disagrees with the Department of Finance's
15 position -- excuse me. Staff agrees with the Department
16 of Finance's position that the advisory committees for
17 the Federal Indian Education Program and the
18 Compensatory Education Program are required to comply
19 with the open meeting provisions of the Federal Advisory
20 Committee Act. However, staff finds, as set forth in
21 the matrix of the staff's analysis, that the notice and
22 agenda requirements imposed by the test claim
23 legislation are broader and exceed the requirements of
24 the Federal Advisory Committee Act.

25 Staff further finds there is no authority for
26 the position that a legislative body must have been
27 created in response to a state mandate in order to be
28 eligible for reimbursement or compliance with the Brown

1 Act. Staff concludes that the test claim legislation
2 expanded the notice requirements under the Brown Act.

3 And as with respect to the discussion before,
4 the issue before us is not whether or not the school
5 site councils and advisory committees are
6 state-mandated. The issue is whether or not the Brown
7 Act applies to their meetings.

8 Will the parties please state their names for
9 the record.

10 MR. SHERWOOD: That is the staff's conclusion?

11 MS. HART JORGENSEN: That is the staff's
12 conclusion.

13 MR. SHERWOOD: Correct. Go ahead.

14 DR. BERG: Carol Berg, Education Mandated Cost
15 Network.

16 MR. FONTAINE: Ron Fontaine, representing Kern
17 High School District.

18 MR. CUNNINGHAM: Jim Cunningham, San Diego
19 Unified School District, the claimant.

20 MR. MINNEY: Paul Minney with Girard and Vinson,
21 on behalf of Mandated Cost Network.

22 MS. OROPEZA: Jeannie Oropeza, Department of
23 Finance.

24 MS. LOPEZ: Good morning. Leslie Lopez,
25 Attorney General's Office on behalf of the Department of
26 Finance.

27 MR. SHERWOOD: Once again, good morning, and
28 thank you for being here on this issue once again. I

1 guess we'll follow our normal practice and allow the
2 claimants to go first. Mr. Cunningham, were you going
3 to be the point person on this?

4 MR. CUNNINGHAM: Yes, thank you. There's
5 several reasons why the Commission must find that the
6 test claim statutes imposed a reimbursable
7 state-mandated new program or higher level of service.
8 The Department of Finance and the Legislative Analyst's
9 Office have raised a ruckus about the interpretation of
10 article XIII B, section 6, primarily the Hayes and
11 Sacramento II cases and whether the State imposes a
12 mandate when it imposes requirements as a condition of
13 funding.

14 We've rebutted these comments in our written
15 comments. However, even if the Commission would agree
16 with the state agencies on those arguments that the
17 programs that require the school site councils are
18 voluntary, the Commission still must find that the test
19 claim statute imposes a reimbursable state-mandated new
20 program.

21 And why is that true? There's two reasons.
22 First, staff now recognizes the mandate alleged in the
23 test claim is not a requirement to create the school
24 site councils. The mandate is the imposition of the
25 open meeting requirements on the school site councils.
26 Let me repeat that. It's -- the mandates are the open
27 meeting requirements imposed on school site councils,
28 primarily the requirements to prepare and post an

1 agenda.

2 The test claim requirements were not imposed as
3 part of the various statutes that put into place
4 programs that required the creation of the school site
5 councils. The open meeting test claim requirements were
6 imposed years after those programs that created the
7 school site councils were created.

8 The test claim statutes are not man -- are not
9 discretionary. They are clearly mandatory. There is no
10 discretion involved on whether to comply with those or
11 not. And, again, they are not part of the programs that
12 have the funding.

13 The Commission has correctly held in other test
14 claims that the requirements imposed on a school
15 district after it has made a supposedly voluntary
16 election are mandated if the -- if a requirement is
17 added after you made the decision, then it wasn't a
18 factor in the decision on whether or not to participate
19 in the program. And therefore because it is mandatory,
20 it is we're entitled to reimbursement.

21 The second reason why the Commission should
22 approve this test claim is that you've already
23 determined that the same activities that are set forth
24 in this test claim statute are reimbursable. Even if
25 you agree with the Department of Finance that school
26 site councils were covered under Brown Act prior to
27 1986 -- or actually prior to 1993, which is a position
28 we strongly disagree with, the Open Meetings Act changed

1 significantly in 1986 to add agenda requirements to all
2 legislative bodies. And this Commission has already
3 found that those requirements are a reimbursable state
4 mandate.

5 What the test claim legislation did in two
6 steps -- again, assuming that they were covered prior to
7 1993 -- was to continue most of those same requirements
8 in the Education Code and to take them out of the
9 Government Code. Now, there's no reason, and the
10 Department of Finance has provided no reason, why
11 something ceases to be reimbursable merely by moving the
12 requirement from one code section to another code
13 section. So for that reason, even if you buy all of the
14 arguments of the state agencies, you still have to find
15 that this imposes a reimbursable state-mandated new
16 program.

17 The other issue that they've raised deals with
18 whether or not a program is truly voluntary or can be
19 mandated through compulsion. As staff notes, we don't
20 believe this is really presented in this test claim.
21 We've provided comments on it. We are prepared to
22 discuss that in any rebuttal to the Department of
23 Finance if the Commission decides it needs to go there.
24 However, we agree with the staff analysis. We believe
25 you should approve this test claim based upon the staff
26 analysis. And, again, we'd like to reserve comments on
27 other issues for rebuttal.

28 MR. SHERWOOD: Thank you. Does anyone else from

1 the --

2 DR. BERG: Yes. I only want to reiterate what
3 Mr. Cunningham has said. And that is, the focus of this
4 test claim is on this question: Did the Open Meetings
5 Act require a new duty of school site councils, and the
6 answer to that is a definitive, yes, it did. And that's
7 the only way that this Commission can possibly find
8 regarding this question. And I urge you not to be
9 dissuaded from that singular path, because the title of
10 the test claim is what has run, I think, the Department
11 of Finance amok. They got sidetracked into other kinds
12 of discussions that is -- that is not pertinent to this
13 particular test claim. Thank you.

14 MR. SHERWOOD: Thank you. Paul.

15 MR. MINNEY: A recent precedent for what Jim
16 Cunningham was saying, the position on a mandate on
17 voluntary activity would be the posting of school
18 accountability report cards, where we got sidetracked
19 with the discussion of whether or not school districts
20 were required to have Internet access first and
21 foremost, but they put a mandate on districts that had
22 Internet access and you had to post the card. So,
23 again, it was a mandate on a voluntary activity where
24 the Commission recognized that mandate. We would just
25 support staff's very well reasoned and thoroughly
26 researched analysis and staff's recommendation.

27 MR. SHERWOOD: Thank you. Anyone else? Would
28 the board like to ask questions or wait until after we

1 hear from the Department of Finance? Wait? Okay.

2 Department of Finance.

3 MS. LOPEZ: Good morning. Leslie Lopez. Well,
4 as we stated in our letter brief to the -- to the
5 Commission, what this test claim really boils down to is
6 whether there's a difference between state-mandated
7 costs and federally-mandated costs.

8 What the claimants have focused upon is this
9 sort of incentive and whether -- whether something's
10 truly voluntary. That doesn't show up in the state
11 statute. And it's Finance's position that there's a
12 difference in the definitions for a reason. And the
13 legislature has decided that for the best interests of
14 the State, the State can have these voluntary programs
15 out there and then attach conditions to them.

16 And, you know, we went through the laundry list
17 of all of the site councils that are involved in the
18 test claims, and all of them have some sort of a feature
19 where there's a decision to participate in the program.
20 And if you participate in the program, then certain
21 conditions and qualifications apply, and then you get
22 some funding.

23 But the converse is also true. If a school
24 district decides not to participate in that program,
25 they don't get the funding, but, again, they don't
26 provide the program services, so they're really not out
27 anything.

28 I'd also point out that in terms of the focus of

1 this -- and this the January 26th San Diego rebuttal
2 brief. They state there that the test claim does allege
3 that school site councils and the advisory committees
4 listed in the Education Code are mandated. So, you
5 know, I'm not sure who's focusing on what here, but, you
6 know, as we walked through all the statutes, there has
7 to be some sort of a decision made to participate in the
8 program. Then an advisory body is set up by the
9 district. The statutes describe what is the composition
10 of these boards, but it's the district that has the
11 final decision-making authority over that.

12 And it's our position that advisory committees
13 of this type have been subject to the Brown Act since
14 the 1960s. That's been the position of the AG's office
15 consistently since almost the creation of the Brown Act.

16 If you have any questions, I'd be happy to
17 answer them.

18 MR. SHERWOOD: I'm sure we will.

19 MS. GOMES: At this point I would like to hear
20 Mr. Cunningham's response to the voluntariness of the
21 program that Ms. Lopez has cited.

22 MR. CUNNINGHAM: Yes, thank you. Again, I don't
23 think we even need to get there to reach this decision.
24 We are prepared to go through the analysis that the
25 Department of Finance went through to get to their
26 conclusion. We believe that the Hayes case and the
27 Sacramento II case, the logic of that case applies not
28 strictly to federal programs, but also to state

1 programs, and from a practical point. And we think the
2 legal interpretation, you can have a program imposed on
3 you through compulsion in addition to having a strict
4 legal requirement, and that's what the Hayes and
5 Sacramento II cases go through.

6 If you wish, I've got my own analysis of the
7 difference between 17513 and 17514 that I've provided in
8 my comments. I have some handouts today, if that's your
9 request that we go through why I think the Department of
10 Finance is barking up the wrong tree on that issue as
11 well.

12 But from our perspective, you don't have to go
13 there. Even if you assume that the issue -- that these
14 promises are voluntary, there's so much money at stake.
15 There was a clear intent of the legislature to impose
16 these requirements through compulsion. There are some
17 very practical -- serious practical results from
18 declining billions of dollars in revenues which these
19 programs make available. It's how the State has handed
20 out money to school districts recently. Everything
21 comes through a categorical funding. There are no new
22 funds. And we can go through that analysis. But,
23 again, my recommendation would be that you have enough
24 before you to make the decision that these school site
25 councils, the Open Meetings Act requirements on school
26 site councils were imposed through a statute that has no
27 discretion, was imposed years after these voluntary
28 programs were in place. They are not -- the Open

1 Meetings Act requirements are not part of the
2 categorical funding statutes. They were separately
3 imposed first by the Brown Act and then by the separate
4 Education Code provision.

5 But, again, if you care to go through my more
6 detailed analysis, I'm prepared to do that.

7 MS. GOMES: Thank you.

8 MR. SHERWOOD: So it's your contention that it
9 would not be -- that this is going to be a Hayes Act
10 decision or based upon that, it would be related to the
11 fact that whether it's voluntary or not makes no
12 difference. So if the board make a decision with the
13 staff's finding, we're not even discussing the voluntary
14 concept of whether or not these school site boards are
15 voluntary or not.

16 MR. CUNNINGHAM: That's my understanding of the
17 staff's recommendation, yes.

18 MR. SHERWOOD: Now, when we had the first -- or
19 the last hearing on this particular matter, staff made
20 recommendations and options and they were based on a
21 little different concept than what we see today. And we
22 were looking then at the possibility of some of these
23 advisory committees being voluntary whereas the school
24 site councils were mandatory under that analysis.

25 That issue -- before we get to the issue that's
26 being discussed at this particular meeting -- is still
27 of importance to me in that Finance is indicating,
28 basically, that all school site councils -- not all, the

1 eight that we're talking about here -- and advisory
2 committees are voluntary. And yet in reading through
3 all the material, I'm not quite sure of that when it
4 comes to the school site councils and especially those,
5 not so much the advisory committees.

6 Can you tell me, explain to me, why the school
7 site councils are not voluntary, but mandatory at the
8 school level.

9 MR. CUNNINGHAM: Well, some of the statutes -- I
10 think, the staff has set this out very well. Some of
11 the statutes that are -- there is a requirement for you
12 to form a school site council to decide whether or not
13 you're going to participate in programs.

14 MR. SHERWOOD: Okay. That's an important point
15 right there. I know that the material talks about
16 shells, shells created. And then I believe Finance
17 somewhere back here in this material talks about there
18 had to be an act before you get to the shell, there was
19 an act made at the district level or something of that
20 nature.

21 MR. CUNNINGHAM: Yeah, that was their
22 contention. I don't know whether they had anything that
23 supported that.

24 MR. SHERWOOD: No, that's their contention. I
25 agree. I agree. What would your comment to that be?

26 MR. CUNNINGHAM: Again, I can't -- I read the
27 law the way the staff has analyzed it. I don't see any
28 additional decision that's made by the -- by this board.

1 It's a decision made at the school site level based upon
2 this statute whether or not you are even going to
3 participate in the program at that site.

4 MR. SHERWOOD: Okay. I know the Department of
5 Finance wants to make a comment on that. Would you go
6 ahead, please.

7 MS. OROPEZA: I'd like to point out that not
8 every school district currently has a school site
9 council, thereby implying that it is not a mandatory
10 requirement. In the past, the legislature as well as
11 the administration has provided incentive funding for
12 various programs, including these programs that you have
13 before you. And as a condition of receiving those funds
14 in some instances the site councils, if they are
15 available, are required to provide -- come up with plans
16 and determine how to spend those funds. And, again,
17 they are not mandated. There's even provisions that
18 allow for those districts that do not have site councils
19 to use other groups to provide this service.

20 And, again, many of the programs before you, not
21 all districts participate. For example, the dropout
22 program, the maintenance and motivation, there is only
23 about 35 to 40 districts out of the 1,047 districts, so
24 we clearly disagree with the fact that school site
25 council -- including school site councils, which most
26 districts do have, but not all -- are mandated.

27 The other thing I wanted to point out sort of on
28 a separate issue is that from our perspective the

1 legislation that was passed in '93 simply clarified who
2 was required to adhere to the Brown Act requirements.
3 The fact that those site councils or advisory committees
4 were not complying isn't the issue. They should have
5 been complying, most likely, but this legislation simply
6 clarified and reduced the requirement for those advisory
7 committees. And so we think that even that requirement
8 isn't valid.

9 DR. BERG: We need to disagree. And the reason
10 we need to disagree is I'm one of the old girls who was
11 around when the program started. And the school site
12 councils and their creation were originally not a
13 legislative appointed act of the school board. They
14 were done at the school site.

15 And it wasn't until 1993 when the Brown Act
16 Reform -- and that's what it was called -- the Brown Act
17 Reform came along on the heels of a major change in
18 terms of school reform, and it was called the
19 School-Based Coordinated Program, which removed the
20 individual determination by school site whether you were
21 going to be a school improvement school or not to the
22 district level.

23 And it was at that point that the district, the
24 school board, would then actually appoint through a
25 recommendation process -- the school sites themselves
26 made the recommendation of who was going to be on the
27 council and the board ratified it. But it wasn't until
28 after the Brown Act Reform Program had begun that these

1 were constitutionally legislative bodies created by the
2 Board of Education. Before that they weren't.

3 And I'm here to tell you, sir. In those olden
4 days, we never had an agenda. We never posted an
5 agenda. They were not open meetings. And it was Brown
6 Act Reform that caused all of that to come into play.

7 MR. SHERWOOD: Thank you, Carol.

8 MR. CUNNINGHAM: And, again, the point needs to
9 be made, even if they were covered, the 1986 legislation
10 was the one that required an agenda of any legislative
11 body. And this Commission has already found that those
12 agenda procedures are reimbursable. There's no reason
13 that those activities would cease to be reimbursable
14 simply because they were moved from the Government Code
15 to the Education Code.

16 DR. BERG: Right.

17 MR. SHERWOOD: Thank you.

18 Further questions? Joann.

19 MS. STEINMEIER: Just a comment. I need to
20 second what Ms. Berg just said or Dr. Berg just said.
21 Although I wasn't on a school board when they were first
22 formed I certainly was there when the change occurred.
23 And I can concur that they were really, really truly
24 just very informal advisory committees before. And no
25 one ever thought, no one ever even brought any suit
26 against them if they had literally under the Brown Act.
27 No one even talked about Brown Act requirements,
28 anyplace in the education community anywhere. So if we

1 were just ignorant, we were ignorant. But no one had --
2 no one in the State ever thought that, or I believe
3 lawsuits probably would have occurred due to any action
4 the site council might have taken.

5 But the 19 -- the 1993 changes were cataclysmic.
6 I mean, the board began to talk about the site councils.
7 We approved their bylaws. We never -- they never even
8 had bylaws, for goodness sakes before that. So they
9 really became legislative bodies because of the Brown
10 Act change, really clear. They came under the Brown Act
11 at that point.

12 The reason why -- why some of those heavy
13 requirements were taken off them is because you wouldn't
14 have gotten anybody to serve on them. That was the
15 problem. No one wanted to have to undergo what a member
16 of a legislative body has to go through in this state,
17 except for a few of us strange people who still can do
18 that. Mr. Lazar is one of those people. You know, your
19 life's an open book.

20 And site councils really don't want to be that.
21 They wanted to be advisory committees.

22 So I am absolutely convinced they were not under
23 the Brown Act prior to 1993. If they were, someone was
24 dreaming.

25 As far as the existence of site councils today,
26 I do not know a school district in the state of
27 California, but maybe I live a sheltered life, that does
28 not have site councils at almost every school unless

1 there's some strange reason because funding is directly
2 attached to it. There's no way you would have any
3 reasonable amount of funding for school improvement if
4 you didn't have a site council. So unless you're just
5 stupid or brain dead, you had a site council. I mean,
6 there was no reason not to.

7 So some of these arguments about they were not
8 covered or covered just don't make sense to me. And it
9 was really clear that the 1993 changes kicked in an
10 incredible amount of difference in the way we treat site
11 councils.

12 So I think you don't even have to look at the
13 coercion piece at all. It's real clear to me. I mean,
14 it was like a major change in school districts in
15 California once that law was passed.

16 MR. SHERWOOD: Further questions? Yes, Michael.

17 MR. FOULKES: Just a follow-up comment. I
18 apologize, I'm getting over a cold so I'm trying to not
19 talk very much today.

20 And I think I agree with both what the claimants
21 and what Ms. Steinmeier said in terms of what people's
22 perceptions were at the time. Certainly that they
23 weren't -- that they didn't perceive themselves being
24 under the Brown Act. But the question, I think, that
25 the Attorney General's Office gets to is, whether or not
26 they were practicing under that, were they legally
27 required to do that. And the fact that people weren't
28 suing them only because they weren't, that's a whole

1 different issue than whether they were supposed to.

2 MS. STEINMEIER: In California?

3 MR. FOULKES: You know, the Controller's sense
4 is that -- that from a legal standpoint, they should
5 have been following the Brown Act. So -- so she agrees
6 with -- with the Attorney General's opinion on that.
7 Now, the question of whether or not these are requiring
8 additional things is a different issue. But from the
9 sheer -- the basic substance of the Brown Act, she sees
10 that as going further back than the 1993 law.

11 MR. BELTRAMI: Why does she think the '93 law
12 was passed then?

13 MS. STEINMEIER: Why even bother?

14 MR. BELTRAMI: Why did we need a '93 law at all
15 then?

16 MR. FOULKES: Well, again, I, you know, haven't
17 read the whole statute, I mean, the whole bill, so. I
18 wasn't here in '93 which is why. I was practicing law
19 so -- so I can't speak to that and I don't know her
20 reaction to that, but again, I think there's, you
21 know -- there are a whole lot of people right now who
22 the Brown Act applies to who aren't following it.

23 So often the -- from a legislative perspective
24 the legislature will say, you know, there's a variety of
25 reasons for giving people direction to do what they're
26 supposed, for example, the school improvement. This is
27 an example where the law sort of cleared what the locals
28 had to do, but if you don't do it there wasn't much

1 enforcement teeth in it unless you clarified the law and
2 put some teeth into it.

3 MS. LOPEZ: If I can respond?

4 MR. SHERWOOD: Further comments from the
5 members?

6 Department of Finance.

7 MS. LOPEZ: Thank you. If I could respond to
8 that, it's the AG's opinion, and it's a formal written
9 opinion -- oh, I'm sorry -- has taken a formal opinion
10 that advisory bodies were subject to the Brown Act since
11 the 60s, all of the requirements of the Brown Act.

12 The '93 amendments to the Brown Act, there was
13 just a whole host of amendments. And in our view, it
14 didn't expand the definition of legislative bodies, it
15 just sort of condensed a whole laundry list of them and
16 worded it a little bit differently, but it wasn't
17 necessarily an expansion of what type of bodies were
18 subject to the Brown Act.

19 So '93 didn't add any -- any new Brown Act
20 requirements. And then when the Ed Code amendments came
21 out, what that did was reduce the Brown Act
22 requirements. So if that clarifies your question --

23 MR. BELTRAMI: Does the AG enforce the Brown
24 Act?

25 MS. LOPEZ: No. There's not -- there's not --

26 MR. BELTRAMI: The interpretation is that
27 everyone is covered by this and they're not doing it,
28 then they pass another law. You would assume the AG

1 would have talked to the local district attorney and
2 there would be some action taken.

3 MS. LOPEZ: Well, it could be that, you know,
4 issue didn't really come up, but --

5 MR. BELTRAMI: It must have come up because we
6 seem to have a new law on the books since '93.

7 MR. CUNNINGHAM: For the Attorney General to be
8 correct on that position, they have to prove two things,
9 and we don't think they can prove either one of those
10 two things. First of all, they had to show that a
11 school site council was an advisory committee to the
12 school board and, second, that the school site council
13 was created by formal school board governing board
14 action. And we've provided in our rebuttal that school
15 site councils do not advise school boards. They are
16 created by statute to make state-directed policy
17 decisions at a school site level.

18 Second, this school site council members are not
19 appointed by the school boards. They are appointed
20 according to the statutory scheme that is put into each
21 of these different statutes. And the statutes specify
22 who the members will be. The members generally will be
23 the principal of the school and an equal number of
24 teachers and parents. Sometimes students sit on those.

25 And they are not created by any formal action of
26 the school board. Formal action means something like a
27 resolution or an ordinance, and there is no -- they are
28 not created by any action that is similar to that type

1 of formal action.

2 So, again, they have to show that they are
3 advisory committees. For them to be successful to say
4 that they were covered prior to '93, they have to show
5 that they were an advisory committee to the school
6 board. They are not. And they have to show that they
7 were created by formal action of the school board, and
8 they were not.

9 But, again, even if you agree with them on that
10 point, you have to go back and understand that what this
11 does is to continue the agenda requirements, the Open
12 Meeting Act requirements, that were imposed in 1986, and
13 you have already determined that those are reimbursable
14 activities.

15 MR. SHERWOOD: Board members, any further
16 questions?

17 MS. STEINMEIER: I do have one other item.
18 There are several bodies -- besides school site
19 councils, we're also talking about bodies that were
20 created by federal statute, the Issue 3 on page 20 talks
21 about the Federal Indian Education Program and the
22 Compensatory Education Program that were mandated by
23 federal law rather than state law. Did any of claimants
24 want to talk about that piece, which we haven't really
25 talked about?

26 MR. SHERWOOD: Do claimants wish to make a
27 comment on that?

28 MS. STEINMEIER: In the staff analysis.

1 MR. SHERWOOD: The comparison on page 20, 21, I
2 believe it is.

3 MR. CUNNINGHAM: The matrix?

4 MS. STEINMEIER: Yeah. Specifically the federal
5 programs, Mr. Cunningham, that come under the Brown Act
6 because of the same logic? Different logic?

7 MR. CUNNINGHAM: Well, again, I think that staff
8 has done an excellent job in their matrix to show the
9 differences between federal requirements for open
10 meetings and state requirements for open meetings, and
11 we agree with the staff that they have done an
12 exceptionally good job on that. The result of that is
13 that under that analysis that the main activity, which
14 is the preparation of an agenda for each of the
15 meetings, is not required under federal law, but yet is
16 required under the state law.

17 MS. STEINMEIER: Thank you.

18 MR. SHERWOOD: Further comment? Yes, Michael.

19 MR. FOULKES: I just look right to the --
20 Mr. Cunningham brought up the issue of the '86 action
21 that was taken, and I don't see that in here so I was
22 wondering if staff could comment on his contention that
23 this is a continuation of what we found in '86.

24 MS. HART JORGENSEN: Okay. I wasn't there for
25 the original Open Meeting Act, but the way that I
26 understand that it applies -- and, Paula, correct me if
27 I'm wrong -- I don't think any distinction was made as
28 to whether or not any of the programs were

1 state-mandated, but for the local programs that were
2 required to comply with the Brown Act. I think it was
3 the Brown Act came down, said to local agencies they
4 must comply with this, and I don't think there was any
5 determination as to whether or not -- I mean, obviously
6 they had to be locally created but it applies to bodies
7 that were -- that they were created by the local
8 government.

9 So just by virtue of the statute, the way I
10 understand it was, there was no distinction made as to
11 whether or not the local legislative body of the local
12 body was mandated. I don't think it could have been
13 under our definitions here because the locals created it.

14 Carol, I think I defer to your historical --

15 DR. BERG: The old girl, right?

16 MS. HART JORGENSEN: -- indicating that you --
17 that you did not think that these were approved by the
18 local districts.

19 DR. BERG: Well, they weren't. They weren't
20 until after the Consolidated Application Program came
21 into play.

22 MR. CUNNINGHAM: Yeah, the other comment is the
23 original requirement that you have a city, you know,
24 forming a city is a -- if you buy the Department of
25 Finance argument, forming a city is a discretionary act,
26 so any mandates imposed on a city follow the creation of
27 a discretion -- the exercise of discretion to form a
28 city.

1 DR. BERG: So there are no mandates.

2 MR. CUNNINGHAM: So there are no mandates for
3 cities. If there's been a county that's been split off
4 at some point in time, you know, that's a discretionary
5 activity and any mandate that follows from that
6 obviously can't be a mandate. So again the
7 Department --

8 MR. BELTRAMI: Not since 1911.

9 MR. CUNNINGHAM: -- continues to take this on to
10 its ridiculous extreme. And, again, we don't need to go
11 there.

12 DR. BERG: You don't need to go there.

13 MR. FOULKES: I guess to get back to what my
14 question was, you don't really have knowledge of what
15 the committee, from the staff perspective, what happened
16 in '86.

17 MS. HART JORGENSEN: What do you mean what
18 happened?

19 MR. FOULKES: What the action by the Commission
20 was.

21 MS. HART JORGENSEN: Well, it wasn't in '86.

22 MR. FOULKES: Well, whenever.

23 MS. HART JORGENSEN: When was the open meetings
24 test claim?

25 MS. HIGASHI: Ask one of the claimants.

26 DR. BERG: '89.

27 MR. CUNNINGHAM: I believe it was 1989.

28 MS. HART JORGENSEN: And when I looked through

1 the record of parameters and guidelines, and I didn't
2 see -- in fact, I specifically looked for it to see if
3 there was any distinction made as to how or under what
4 authority the body that was required to comply was where
5 it came into existence. I did specifically look for
6 that. So I don't know if it was brought up or if
7 everyone just --

8 MR. CUNNINGHAM: If Mr. Foulkes' question is, is
9 the activity that we're seeing here the same activity
10 that's reimbursable under the Open Meeting Act
11 statute --

12 DR. BERG: Yes.

13 MR. CUNNINGHAM: -- then I think the answer is
14 clearly yes, and I think staff would agreed with us.

15 MS. GOMES: And that's in regards to posting the
16 agenda and in that respect.

17 DR. BERG: Right.

18 MR. CUNNINGHAM: That's correct.

19 MS. GOMES: But not necessarily the creation of
20 the programs themselves.

21 DR. BERG: Right.

22 MS. HIGASHI: But the issue is whether --

23 MR. CUNNINGHAM: I know that that issue was
24 discussed.

25 MS. HIGASHI: And if the claimants were to be
26 reimbursed for the activity one way, if the Commission
27 would approve this test claim, one way of doing it would
28 be to amend the Open Meeting Act Ps and Gs and to add

1 the descriptions for these bodies.

2 MR. CUNNINGHAM: Actually, I don't think we
3 would be able to do that because the Open Meetings Act
4 Ps and Gs relate to the Government Code provisions, and
5 this is now an Education Code provision, so.

6 MS. HIGASHI: I just suggested that was one way
7 that it could be done.

8 MS. HART JORGENSEN: And Michael, does that
9 answer your question? I think -- I don't --

10 MR. FOULKES: What is my question? My question
11 was answered by the claimants. I was hoping that staff
12 would have that institutional knowledge, but apparently
13 they don't.

14 MS. HART JORGENSEN: And, again, I don't have
15 personal knowledge for that, so I was deferring to them.

16 MR. FOULKES: Right.

17 MS. HART JORGENSEN: Was your question answered?

18 MR. SHERWOOD: Michael, the comment you made
19 earlier, if your feeling is, though, that this goes back
20 to '61 --

21 MR. FOULKES: That's why I was just curious as
22 to when they brought it because it wasn't in our
23 write-up notes.

24 MR. SHERWOOD: The feeling is it goes back to
25 '61. It really doesn't make any difference.

26 MR. FOULKES: No. No. I was just curious.

27 MS. STEINMEIER: One thing, Mr. Sherwood --

28 MR. SHERWOOD: Yes.

1 MS. STEINMEIER: -- then I want to make a
2 motion.

3 Mr. Minney brought this up. We, not too long
4 ago, approved another test claim that had to do with
5 posting the school improvement report cards on the
6 Internet. Now, it is discretionary for school districts
7 to have a Web site. You don't have to do that. And yet
8 we found that that was a mandate. I think there's a
9 good parallel here.

10 If you didn't have -- let's say you didn't have
11 to have a site council. I think it's almost mandatory,
12 but let's take that aside. Let's say you didn't have to
13 have them. The fact that you do means that they are now
14 absolutely subject to the Brown Act as of 1993. I think
15 that's pretty clear.

16 And -- and if they're optional or not, it
17 doesn't really have any bearing on the case, although I
18 can make a case, and I'm sure Mr. Cunningham and others
19 could, that it wasn't optional. It was totally
20 coercive, if we want to go to that kind of rationale,
21 which I clearly heard you saying you don't want to do.

22 So I'd like to move the staff recommendation on
23 this matter, that we approve that there is a
24 state-mandated program.

25 MR. LAZAR: I'll second.

26 MR. SHERWOOD: We have a -- we have a motion.
27 Do we have a second?

28 MS. HART JORGENSEN: Joann, so we don't run

1 into --

2 MS. STEINMEIER: The same problem we had before,

3 I need to amend that, don't I? This test claim has a

4 reimbursable state-mandated program, and the staff's

5 analysis is a part of that motion.

6 MR. CUNNINGHAM: The staff recommendation?

7 MS. STEINMEIER: The staff recommendation is

8 actually a part of that motion, yes.

9 MR. SHERWOOD: And Joann, this, therefore

10 whether or not the program was voluntary or not has no

11 effect.

12 MS. STEINMEIER: We are not using that in this

13 analysis.

14 MR. SHERWOOD: Okay. I just wanted to make that

15 clear.

16 MS. STEINMEIER: Yes. In light of what just

17 happened a little while ago, yeah. For the purposes of

18 this test claim, yes, sir.

19 MR. SHERWOOD: Now, we have a motion.

20 MS. STEINMEIER: And a second.

21 MS. HIGASHI: We have a second.

22 MR. SHERWOOD: Do we have a second?

23 MS. STEINMEIER: Yes, by Mr. Lazar.

24 MR. SHERWOOD: By Mr. Lazar. I apologize.

25 MR. LAZAR: Yes.

26 MR. SHERWOOD: Okay. To revisit the issue of

27 the voluntary relative to the case you're referring to

28 on the Internet, I wonder if anyone could give me a

1 little more detail and backdrop on that.

2 MR. CUNNINGHAM: I'd be happy to do that,
3 Mr. Sherwood. The test claim at issue then was the
4 school accountability report cards. It was a
5 requirement that we post a number -- that each school
6 put together a -- call it a school accountability report
7 card that has a number of different, I guess they'd be
8 sort of --

9 DR. BERG: They're informational.

10 MR. CUNNINGHAM: -- informational items such as
11 your default, your dropout rates at that school, the
12 school crime statistics for that school, a number of
13 other things.

14 One of the requirements in that was that the
15 school accountability report card had to be posted to
16 the Internet. And there was a discussion by this
17 Commission whether or not an Internet -- having an
18 Internet site was optional or not. And the Commission
19 decided it really didn't need to make that determination
20 because for most schools, they had already made the
21 determination to get on the Internet, and this
22 legislation was imposing a requirement after that
23 decision had already been made.

24 So you can't unring the bell on that decision.
25 It was made, and the decision of whether or not to have
26 an Internet site was made before you had the requirement
27 to post these school accountability report cards, so it
28 didn't enter in the decision-making on whether you were

1 going to have a website or not have a website.

2 MR. SHERWOOD: How did that affect the programs
3 going forward? We're talking about programs that had
4 this Internet in place at the time of the decision. If
5 it was a voluntary situation, what about the programs
6 going forward voluntarily?

7 MS. HIGASHI: It's my recollection -- Mr. Staply
8 (phonetic) is here, he could help me on this -- that we
9 clarified and allowed for reimbursable activities only
10 those activities and only those costs that were directly
11 related to the information requirements imposed by the
12 superintendent and the legislation for the gathering of
13 that data compilation, preparation, and actual posting
14 on the Internet. We did not include as reimbursable the
15 establishment of the Internet connection, as I recall,
16 and the payment of those fees for establishment of the
17 Internet connection.

18 And it was clearly -- we had three or four
19 prehearings to get through this set of Ps and Gs. And
20 as I recall at the end it was pretty much agreed to what
21 did get adopted.

22 MR. SHERWOOD: Thank you. Department of
23 Finance.

24 MS. OROPEZA: And back again to your point or
25 your question, the school accountability report cards
26 are required in statute. They are not voluntary and
27 therefore, you know, I would agree that if then you
28 mandate that those school districts that have an

1 Internet post them, that is appropriate. But the report
2 cards, unlike some of these other programs, are
3 required.

4 MR. CUNNINGHAM: Just as the Open Meeting Acts
5 requirements are required.

6 MS. STEINMEIER: That's why I didn't want to go
7 there. Now you understand why. Because all of a sudden
8 you -- I don't think we actually need to, in order to
9 find this one, I don't think we have to. And that's why
10 the staff analysis probably doesn't include it. You
11 don't need to get off on that particular piece, if it
12 was voluntary or involuntary. I could make a pretty
13 good case that it was very coercive that you had to do
14 it because the funding was incredible. But for the
15 purposes of this test claim, I want us just to do it
16 based on the staff analysis, which does not include that
17 piece.

18 MS. HART JORGENSEN: And maybe if I can explain,
19 the reason why the analysis was changed was because
20 these programs were already enacted. They're already in
21 place.

22 MS. STEINMEIER: Very good.

23 MS. HART JORGENSEN: They're already there.
24 So -- and I myself got caught up --

25 DR. BERG: Sidetracked.

26 MS. HART JORGENSEN: -- thinking that the
27 issue -- and you're right, the caption is school site
28 council, so I myself went there, and then I sat down

1 when it came back to me and officially to me, I looked
2 at it, and that was my conclusion, that was my
3 recommendation. But, again, the testimony has been very
4 helpful here and it's good to look at this and also
5 to -- I'm glad Mr. Foulkes asked the question he did so
6 we could then see what we've done in the past to make
7 sure we're consistent.

8 But it was on the basis of the fact that these
9 perhaps are already in existence that the analysis
10 was -- that the conclusion was reached by the staff on
11 that issue.

12 MS. GOMES: I'm not sure I understand that
13 rationale because they're already in existence. I
14 mean --

15 MS. STEINMEIER: The decision was already made.

16 MS. GOMES: I'm sorry?

17 MS. STEINMEIER: The decision was already made.
18 You couldn't know those things were going to happen, so.

19 MS. GOMES: To have the program in place.

20 MS. STEINMEIER: Right.

21 MS. GOMES: But that in and of itself is
22 discretionary to the school districts.

23 DR. BERG: Not anymore, it isn't.

24 MS. GOMES: Theoretically.

25 DR. BERG: You can't say, "I don't want to play
26 anymore."

27 MS. STEINMEIER: You can't leave the program
28 once you're in.

1 DR. BERG: You can't opt out. It used to be
2 individual school --

3 MR. SHERWOOD: I think this gets back maybe to
4 the question you said you can't opt out.

5 DR. BERG: You can't. Individual schools used
6 to be able to opt in. When the Consolidated Application
7 Program came into place, the district went to school
8 improvement programs. It was no longer an individual
9 site opt in or opt out. The district now decides.

10 MR. SHERWOOD: Millicent, go ahead.

11 MS. GOMES: They basically decide whether or
12 not -- I'm not sure I'm following what you're saying,
13 and I want to be very clear on this.

14 DR. BERG: Okay. The school site council
15 program is tied to a lot of categorical money, okay?

16 MS. GOMES: Right.

17 DR. BERG: It used to be a very limited program.
18 It was limited to K3. When it became a Consolidated
19 Application Program, it expanded from K3 to K12 and
20 became a districtwide program. So it was no longer the
21 local little school district deciding whether I want it
22 to be an early childhood education or not, which was
23 originally the decision that I, as a school principal,
24 made. Yes, I wanted to be an early childhood education
25 school.

26 That was long before the categorical programs
27 and the system of funding schools became what it is
28 today, where we have a mega item with categorical

1 programs all listed in it and every school district has
2 got their hand in those mega item categorical programs.

3 MR. CUNNINGHAM: One of the problems, I think,
4 Dr. Berg hit on is that some of these programs, the
5 school site council is continuing, but a lot of the
6 individual programs have been wrapped into the mega
7 item.

8 DR. BERG: Right.

9 MR. CUNNINGHAM: So there's not necessarily an
10 ability to opt out of an individual program. Now, even
11 if there were, I think then we would get back to the
12 discussion of what Joann was talking about, and that is,
13 you know, is the money so significant, particularly when
14 you're now talking about taking away billions of dollars
15 that you've put in your budget that you've used to
16 implement all sorts of different programs, can you
17 really make a true voluntary decision to opt out? And,
18 again, I think if we had the opportunity to --

19 MR. SHERWOOD: That's not the issue.

20 MR. CUNNINGHAM: -- discuss that, we would come
21 to a completely different conclusion from what the
22 Department of Finance has. And, again, I think that's a
23 very interesting intellectual discussion. We'd love to
24 have that another day on another test claim. I don't
25 think we need to do that.

26 MS. STEINMEIER: We will.

27 MR. SHERWOOD: I'm sure --

28 MS. STEINMEIER: It will be back.

1 MR. SHERWOOD: -- the Department of Finance
2 would like to comment.

3 MS. OROPEZA: I was just going to say that I
4 disagree that a district couldn't opt out and that, for
5 example, as I mentioned earlier, the dropout program
6 provides about \$48,000 total for any district that
7 participates in the program, and if a district chose not
8 to participate in that program they could withdraw.
9 They wouldn't have to provide the service, and
10 therefore --

11 DR. BERG: From a little, tiny, itty-bitty
12 program, but not school improvement programs.

13 MS. OROPEZA: Right. And that's what I'm
14 saying. But you -- but what we have before us are the
15 costs that are associated with those programs and
16 because they can opt out, they do not have to
17 participate, then these activities are as a result of
18 their choice to be included in the program.

19 DR. BERG: We just disagree.

20 MS. GOMES: Going back to the previous argument
21 about the Brown Act and when it applied to these
22 meetings, you know, I mean, it's obvious the claimants
23 are saying that they didn't apply to them prior to 1993.

24 DR. BERG: No, I think it was in '86.

25 MR. CUNNINGHAM: '93 is the date that we believe
26 imposed the requirement for the first time on the school
27 site councils, and that's because of the addition to the
28 definition of the legislature bodies that says it

1 applies to entities created by state or federal statute.
2 That was the key. That was the piece that put school
3 site councils into the Brown Act.

4 MS. GOMES: And the Department of Finance is
5 arguing that they were always subject to the Brown Act
6 from the very beginning.

7 MS. OROPEZA: Correct.

8 DR. BERG: And we would contend they weren't
9 legislative bodies because they were individually
10 appointed at a local school site. The board did not
11 appoint them.

12 MS. GOMES: Now, is a legislative body the only
13 thing that's in that definition as far as --

14 MS. OROPEZA: They also indicated that they were
15 advisory bodies, and that is in the definition.

16 MR. CUNNINGHAM: And, again, that was the
17 discussion, Ms. Gomes, that we had. Again, for them to
18 be correct, they have to say they were advisory
19 committees to the school board prior to -- for them to
20 have been covered prior to 1993. And, again, they were
21 not advisory committees to the school board, and they
22 were not created by formal school board action, which is
23 the second thing that has to happen in order to be
24 considered an advisory committee under the Brown Act.

25 MS. LOPEZ: As we pointed out in our brief, we
26 disagree with that -- that conclusion. The statute sets
27 on just general criteria. You have parents, teachers,
28 and whatnot appointed to these bodies, but it doesn't

1 specify any particular person. There's no mechanism for
2 a state entity to actually appoint somebody. So
3 there's -- other than the school district, there's no
4 other appointing authority out there. It's not the
5 State. It's the local districts.

6 And if I -- just to clarify on the issue of
7 whether we are or are not addressing the voluntariness,
8 I think the only way to grant this claim is to say that
9 the State is somehow precluded from imposing subsequent
10 conditions on a participant in a voluntary program.
11 That's really the gist of the claim. And we're trying
12 to get away from the voluntariness, but I just don't see
13 how you can.

14 As a condition of funding, the State can impose
15 conditions on a voluntary program, whether they've
16 already instituted the program or whether they're making
17 a new decision to start a new program.

18 DR. BERG: Not unless they want to come before
19 this Commission, they don't.

20 MR. CUNNINGHAM: Again, we dispute that point.
21 The point we'd like to make, they didn't impose these
22 requirements as a condition of funding. They imposed
23 these requirements under the Brown Act. It had nothing
24 to do with funding.

25 MR. SHERWOOD: I have a difficulty when I look
26 at the presentation that was made prior to this that
27 we're looking at today. I quite frankly go back to the
28 conclusions that were drawn at that time relative to the

1 School Improvement Program, the Bilingual Education, the
2 School Board Motivation and Maintenance Program and feel
3 that those were mandated and not voluntary.

4 I really have a problem with the other four
5 programs. I feel that they were more in the voluntary
6 category. And the -- my problem is, I'm not quite sure
7 we're getting around the voluntary issues with the
8 current analysis. And if the program is voluntary, I
9 don't feel that it should be recognized as a mandate.

10 And I understand the funding part of this we're
11 talking about there. When it comes to Michael's
12 comments relative to '61, it in some ways doesn't make
13 sense to me that these committees were not included and
14 thought of. Yet what I'm hearing is in practice they
15 weren't considered to be part of the Brown Act. And
16 quite frankly, in 1993 a law was passed that
17 specifically made it clear that they were to be
18 included. It seems like to me the rationale behind
19 doing that -- and I know that there's a lot of
20 documentation to that in the write-up.

21 So -- and I'm just at this point not able to
22 make that jump to the staff's conclusion relative to the
23 current write-up and the Brown Act and Open Meeting law
24 and jumping the path of voluntary nature. So that's why
25 I go back to the prior staff write-up, which considered
26 four of the programs as mandatory and then Option 1, a
27 finding of no cost mandated by the State. That's where
28 I'm finding myself as I look at this issue.

1 MS. STEINMEIER: Maybe we need to discuss the
2 voluntary and involuntary. We need to go to that
3 discussion. There was a difference also that I don't
4 know if anybody brought up, that school site councils
5 prior to -- certainly prior to the School Improvement
6 law, but certainly after the Brown Act law became really
7 noticed, is that they had very little -- they are truly
8 advisory bodies. They were just folks that sat around
9 and talked about how the school -- what direction the
10 school should -- they were actually advisors to the
11 principals, is actually what the site councils were.
12 That were quite informal.

13 And then something changed. As money began to
14 flow to those school sites, they actually had
15 decision-making power over money. That became -- I
16 think that's when it really became necessary to be
17 subject to the Brown Act. We haven't talked about that
18 here, but there was a difference in the quality of the
19 decisions they were making. We weren't just sitting
20 around talking what we were going to do next year. We
21 were talking about how we were going to the spend money
22 next year.

23 At that point, I believe, even the school board
24 member that they needed to be under -- somehow under our
25 control. All we did -- all we actually do is approve
26 their bylaws, but at least we have some control over it.
27 We don't appoint the individuals specifically, but we
28 set up -- we set up essentially how they are going to

1 operate.

2 So they really did qualitatively become a
3 different body at some point. And the Brown Act that
4 we're talking about, 1993, kicks in around the same
5 time, and I'm not sure, I think there's a little overlap
6 in time. But I cannot believe that a group that just
7 sits around and informally advises -- for a city level,
8 unless it's a personnel commission, I mean they clearly
9 are making some decisions. But if you're just an
10 advisory group that talks about the budget for next
11 year, whatever, should they be under the Brown Act?

12 I think prior to the changes in 1993, no one
13 thought that any advisory committee, unless they were
14 appointed by the school board or city council or county
15 government, really were a legislative body. They had
16 no -- there was no authority for that.

17 MS. GOMES: Isn't that contrary to what the
18 statute actually says?

19 MS. STEINMEIER: How's that?

20 MS. GOMES: I thought that's what the Brown Act
21 actually said, that it was in the Brown Act prior so
22 they were included, advisory committees.

23 MS. STEINMEIER: Right, if they were appointed
24 by that legislative body, in other words, the city
25 council, the school board, the county had to say, yes,
26 we approve that these individuals be the advisors.
27 That's the difference.

28 MR. CUNNINGHAM: As Member Steinmeier pointed

1 out very validly, if they were set up to advise
2 somebody, it was to advise the school principal --

3 DR. BERG: Not the board.

4 MR. CUNNINGHAM: -- not the school board.

5 MR. SHERWOOD: Well, isn't the argument down to
6 whether the advisory committee was created by -- you're
7 saying by state, state or federal statute, and that's
8 what is indicated in '93.

9 MS. STEINMEIER: Correct.

10 MR. SHERWOOD: And isn't that supposedly what
11 brought the committees into the Brown Act?

12 MR. CUNNINGHAM: Correct. And there's no
13 question that they were covered by the Brown Act for
14 that four-month period from '93 until the '94 statute
15 was passed. There's no question about that. And that's
16 why we included the '93 statute as part of the test
17 claim.

18 MR. SHERWOOD: But I think that gets back to
19 Finance's comment in saying that they talk about
20 committees and this is what they're referring to.

21 MS. STEINMEIER: Depends on who appoints them.

22 MR. SHERWOOD: Who appoints them.

23 MS. STEINMEIER: Right.

24 MR. SHERWOOD: But we added in '93 the statute
25 that talks about these committees that were created by
26 state statute or federal statute. Is that true? Were
27 they created by state statute or federal statute?

28 MR. CUNNINGHAM: It's state statute, I think, in

1 every instance. It says the school site councils shall
2 be composed of the following members --

3 MR. SHERWOOD: Okay, now, that's --

4 MR. CUNNINGHAM: -- the school principal and
5 the -- an equal number of parents selected by the
6 parents, and teachers selected by teachers, and in some
7 cases, particularly for the high school school site
8 councils, pupils selected by pupils. And that is the
9 framework that most, if not all, of these school site
10 councils operate under. And that is set up by statute.
11 The legislature set that up.

12 MR. SHERWOOD: Okay. Now, maybe Finance could
13 explain his comment about not being created by state
14 statute, that just goes back to '61 and as local
15 councils per your comment to Millicent's question.

16 MS. LOPEZ: Maybe if I could give you an example
17 of a local entity that is created by a state statute,
18 would be something like county sanitation districts,
19 water districts, things of that sort, where a statute
20 will go through and say the mayor of a city by virtue of
21 their office they are on the board, a council member of
22 the city is on the board, and they'll take various
23 elected officials by virtue of their office within a
24 district or a county and they are appointed by the state
25 statute.

26 This just describes -- the school site council
27 statutes just describe appointing parents and teachers
28 and whatnot, but the decision-making is still up to the

1 district. It's -- the State is not specifically a
2 particular person or office holder to be on this board.

3 MR. SHERWOOD: So you're saying the districts
4 created the council.

5 MS. LOPEZ: Right.

6 MR. SHERWOOD: And therefore it goes back to the
7 '61 law.

8 MS. LOPEZ: Right. The -- you know, again, the
9 statutes authorize these programs, and then they
10 authorize these boards, if you want to participate in
11 the program, but the State does not direct a particular
12 person to be a member of this board.

13 MS. STEINMEIER: The school boards never did,
14 never did really appoint site councils until money
15 followed it, until large funding sources came along.
16 That's the difference. In 1961 -- I think it was around
17 '86, I don't know the exact year, but School Improvement
18 Program. Then money began to flow. That's when things
19 got different. So there is a gap between when the
20 School Improvement Program started and the Brown Act.
21 It's probably part of the reason why site councils were
22 specifically specified by the law. Because now they
23 have some real decision-making authority. They're
24 spending money. They're making real decisions that
25 school boards had previously made. That's a part. From
26 '61 to whenever the School Improvement Program started
27 and the money really began to flow, no one really
28 thought much about site councils. That's the

1 difference.

2 And it is coercive, because you would be
3 really -- frankly, "bankruptcy" and "recall" are the two
4 words that come to my mind if you were to pull out of
5 the School Improvement Program. You couldn't do it. It
6 just can't be done.

7 MR. CUNNINGHAM: Let me go back and point out,
8 even if the AG's office and the Department of Finance
9 are correct on that point -- let's assume -- we don't
10 agree, but let's assume that they are advisory
11 committees that were covered by the Brown Act prior to
12 1993. Until 1986, there was no requirement for any
13 legislative body, city council, school board, other
14 entity, to post an agenda or to do many of the other
15 things that were required by the Open Meetings Act.

16 So even if you assume -- and again, we disagree
17 strongly that they were not covered -- or that they were
18 covered prior to '93 -- the activity has been found to
19 be reimbursable. That's the same activity that
20 continued -- under the Department of Finance's argument
21 continued in 1993 or was clarified in '93 and is
22 continued in the Education Code under current law, under
23 the '94 statute.

24 So why does the reimbursable activity cease to
25 be reimbursable simply because it was moved from the
26 Government Code into the Education Code?

27 MR. SHERWOOD: Further discussion? Staff, do
28 you have a comment?

1 MS. HIGASHI: I just wanted to -- during most of
2 the testimony I have been thumbing through the
3 administrative record, and I -- just for those of you
4 who brought your thick package, Exhibit F includes the
5 statement of decision of the Open Meetings Act, and also
6 the Ps and Gs are in here as well. So for those of you
7 who wanted to take a look at that, I wanted to bring
8 that to your attention.

9 Also in the record in Exhibit M as part of the
10 agenda package, Bates pages 441, starting on Bates
11 page 441, is a copy of the Brown Act Guide published by
12 the Attorney General's Office, and there are pages in
13 here, 442, 443, and 444 that go over the government
14 bodies and subsidiary bodies. And I just wanted to call
15 those to your attention, if you wanted to take a look at
16 those.

17 MS. HART JORGENSEN: And having taken a look it,
18 it's the same as in the staff's analysis. On page 444,
19 any board, commission, committee, or other body of the
20 local agency created by charter, ordinance, resolution,
21 or formal action of a legislative body is itself a
22 legislative body. So generally this is the case
23 regardless of whether the body is permanent or
24 temporary.

25 But what it goes back to, it talks about they
26 need to be created by the local government, and that was
27 the definition of bodies that were subject to the Brown
28 Act. So the distinction being made with the new

1 statute, it added the phrase created -- "those bodies
2 created by a state statute or federal law."

3 So before I think it was clear in this instance
4 in the handbook prepared by the AG's office, the Brown
5 Act, it does speak about the fact it has to be created
6 by formal action of that local body. I don't know if
7 that's helpful or not, but that is the history as set
8 forth in the record.

9 MR. SHERWOOD: Okay. We have a motion, and we
10 have a second. Do we need to indicate again exactly
11 what the --

12 MS. GOMES: What was the motion again?

13 MR. SHERWOOD: -- motion was? And also I just
14 want to have staff reiterate what the motion is
15 basically stating, because I think it's important in
16 this particular issue.

17 MS. HART JORGENSEN: The motion -- and again,
18 that's why I originally asked, it could be staff's
19 recommendation was that they find that the 1993
20 legislation -- that the 1993 legislation was the first
21 time a mandate was imposed on these bodies. Then if
22 staff -- staff also said that if the Commission
23 disagrees with that and finds that they were always
24 subject to the Act, there is a statutory exception that
25 applied to advisory bodies that said that they need not
26 post.

27 So I'm going to break down again what the --
28 what was there. And under that -- if that's the case,

1 if that's the Commission's wish, then staff's
2 recommendation is that the subsequent-to-1994
3 legislation with the Education Code should be found to
4 be the mandate because it's under that Code section that
5 they are now required to post and put descriptions in
6 the agenda.

7 So I guess the question is, is the motion that
8 it only became -- they were only required to comply with
9 the Brown Act with '93, or is it with '94?

10 MR. SHERWOOD: I believe it was with '93.

11 MS. STEINMEIER: '93.

12 MS. HART JORGENSEN: '93, okay.

13 MS. STEINMEIER: With the Education Code
14 section.

15 I have a question for you, Mr. Sherwood. Is it
16 going to be difficult for you to vote aye on that motion
17 if the compulsory nature or the nonvoluntary nature is
18 not included? Because I'm willing to amend my motion
19 and add that in. We can have that.

20 MR. SHERWOOD: How would you amendment that?

21 MS. STEINMEIER: Well, in other words, I would
22 add it to the staff analysis that this program was also
23 not truly voluntary. We'll have to have a full
24 discussion about that and add that to the rationale for
25 finding the mandate. And I'm willing to do that, if
26 that will remove your problem with that.

27 MR. SHERWOOD: Millicent, do you have some
28 questions along that also?

1 MS. GOMES: Yeah, I think that it's probably
2 ripe for discussion at this point, especially since --
3 MS. STEINMEIER: I don't want to turn it down.
4 MS. GOMES: -- I don't want to set any
5 precedents for the Commission to vote on voluntariness
6 or involuntariness of programs.
7 MS. STEINMEIER: It's already been done. It's
8 already been done.
9 MR. SHERWOOD: You're saying it's been done on
10 school accountability report cards.
11 MS. STEINMEIER: Well, actually that's only one.
12 There are others too. We've had others like that,
13 sexually violent predators and a couple others.
14 MS. GOMES: Certainly I would be open for
15 discussion on the voluntariness of the programs.
16 MS. STEINMEIER: What I was asking Mr. Sherwood
17 is, is that piece the missing piece that will allow you
18 to vote aye on this? I get the feeling that you will
19 not do so unless there's more to the -- to the
20 rationale.
21 MR. SHERWOOD: Well, I'm -- I think somehow that
22 in my mind it's still not clear on that issue how the
23 current motion rises above that issue.
24 MS. STEINMEIER: It's silent on it, actually.
25 MR. SHERWOOD: And that's what it is, it's
26 silent on it. I think that's the point.
27 MS. STEINMEIER: Okay.
28 MR. SHERWOOD: And it needs to be clear that it

1 is silent on it, and we're not making any
2 precedent-setting decision here, that I'm not voting to
3 say that I'm looking at the voluntary issue.

4 MS. STEINMEIER: Right. We've done that in the
5 past, and we will debate that if you want to. If you
6 want it to be silent, which is the way it is right now,
7 we should go ahead and vote on this one.

8 MS. GOMES: As to whether or not the Brown Act
9 applied to school site councils prior to 1993?

10 MS. STEINMEIER: I would say probably it wasn't.
11 The assumption is that it was not, that it was the '93
12 law that caused that to happen.

13 MS. GOMES: I have a hard time getting around
14 that issue that the law was written in the way that it
15 was prior to 1993, and just because it wasn't formally
16 recognized, I don't -- you know, I don't know how that
17 would come into play as far as an appropriate decision
18 by the Commission. Just because something isn't
19 necessarily followed, it was still legally on the books.

20 MS. STEINMEIER: Well, if the school board
21 actually created the council, I'd totally agree with
22 you. But they weren't, and to the extent that they
23 were, then they would have come under the Brown Act in
24 my mind. But we were very careful not to do that so
25 they could remain informal bodies, not formal bodies.

26 MR. FOULKES: Mr. Chair.

27 MR. SHERWOOD: Yes.

28 MR. FOULKES: On that point, do we actually have

1 any evidence of what schools did and didn't do on this?
2 Because again, we have had oral testimony here from
3 individual school districts and testimony on what the
4 statute said about some general positions. Do we know
5 what school districts had or what they did?

6 MR. CUNNINGHAM: The only evidence that's in the
7 record --

8 MR. FOULKES: Well, I'm asking staff.

9 MS. HART JORGENSEN: In that respect it really
10 goes to the claimants because they have the actual
11 knowledge on that, but this brings a point that I would
12 like to point out, is that I looked through the
13 analysis, the letter from the AG, and I see on Bates
14 page 060, on page 60, it's goes through each of the
15 programs. And I note that each of these programs were
16 in place well before the 1993 amendment.

17 If you look through section 52012, it was
18 enacted in 1977. And a few of them, there's some
19 provisions here that they were sunsetted but yet
20 nonetheless they were grandfathered in. So, again, when
21 I was looking at the analysis, I looked at the fact that
22 these programs were in place well before the change to
23 the Brown Act in 1993.

24 And I guess that would be something you would
25 address in the Ps and Gs. The claimants would have to
26 show that they had had those programs in place. I think
27 that would simply go into the Ps and Gs issue.

28 But I personally at this point can't say whether

1 or not all of them had --

2 MR. FOULKES: Well, I guess that's my -- my
3 point is just that I would not want us to be relying
4 upon anecdotal evidence to make a decision based on what
5 individual school districts did or didn't do, because I
6 don't think that we necessarily know what -- you know,
7 when it gets to this issue whether they were -- whether
8 they were, you know -- on this question of action by a
9 legislative body, that's the question that was asked, I
10 don't know that we have --

11 MS. GOMES: You know, whether formally or
12 informally or however, I mean, the law was still the
13 law.

14 MR. FOULKES: Right. And I think that -- I
15 think that, you know, if you -- so I just -- I just -- I
16 just am concerned when we're talking about things as if
17 we know them to be true and we don't know necessarily
18 what they were doing.

19 MR. SHERWOOD: Well, Michael --

20 MR. CUNNINGHAM: Mr. Chair.

21 MR. SHERWOOD: -- are you asking that possibly
22 we ask for further analysis to see what they were doing
23 and not doing?

24 MR. CUNNINGHAM: Mr. Chair, I might point out
25 that we've provided some of the legislative history in
26 materials that I think speak to Mr. Foulkes' concern,
27 and I guess at best there was confusion as -- at the
28 legislative level as to whether or not school site

1 councils were covered or not covered prior to 1993. The
2 author of the bill that -- for the 1994 legislation took
3 the position they were not covered prior to 1993. It's
4 the author of the bill that changed requirements for
5 school site councils, took them out of the Brown Act,
6 saying that they were inadvertently put in in the '93
7 legislation, and so they were -- again, this was the
8 author of the '94 legislation, and his letter to the
9 Governor said the reason we're adopting the '94 statute
10 is because they weren't covered before and the
11 requirements are onerous, as Member Steinmeier said.

12 Now, there's also, as staff has shown, there's
13 also some legislative history that says that it was
14 uncertain whether they were covered or not and if there
15 is an argument that they were covered prior to '93.
16 Again, this is all legislative history. It's part of
17 the administrative record, so I don't know that it's
18 just anecdotal.

19 MS. GOMES: And so you're saying that there is
20 argument as to whether or not they were included prior
21 to the 1993 legislation?

22 MR. CUNNINGHAM: I'm saying that there was an
23 argument at the time --

24 MS. GOMES: At the time, right.

25 MR. CUNNINGHAM: -- whether or not they were
26 covered. It certainly wasn't conclusive. I can -- I
27 think, again, from the legislative materials that were
28 provided, I think Member Steinmeier was correct, I don't

1 believe that schools thought they were.

2 MS. STEINMEIER: May I comment on what
3 Mr. Foulkes said? This is not anecdotal. If you look
4 on page 13, the letter to Governor Wilson from the
5 author, it says the California School Boards Association
6 came to me earlier this year, see where it says there?
7 I'm in the leadership of the California School Boards
8 Association. We did -- I can provide you stuff. We did
9 surveys on this. School sites were not -- were not
10 operating under that, and their legal advice from their
11 attorneys were that they were not covered under the
12 Brown Act unless the school board appointed those
13 individuals, and then that kicked it in. That's -- that
14 is the operating assumption, and it was how they were
15 being advised by attorneys in the state of California
16 right up to 1993. So I don't think it's anecdotal.

17 MR. FOULKES: Well, and again --

18 MS. STEINMEIER: If you really want data, I can
19 call CSBA and get for you.

20 MR. FOULKES: And again, my question is just
21 that we don't have that data before us, so I'm not --

22 MS. STEINMEIER: That's true, Mike.

23 MR. FOULKES: So it's hearsay, really.

24 MS. STEINMEIER: I can get it for you, if you
25 like.

26 MR. SHERWOOD: Millicent, any more questions?

27 That data could be important relative to this
28 particular question.

1 MS. STEINMEIER: I'm sure it can be obtained by
2 either the claimants or me.

3 MR. CUNNINGHAM: Again, we submit that it's not
4 important because if they were covered, the agenda
5 requirements weren't required for any advisory
6 committee. There's an exception that your counsel's
7 pointed out that advisory -- if they were advisory
8 committees, they didn't have to post agendas. And prior
9 to 1986, no legislative body had to post a detailed
10 agenda, and you've made that decision.

11 And so even if they were covered prior to 1993,
12 it doesn't matter. You still need to approve this test
13 claim because it's just a continuation of that same
14 requirement, the only difference is we can't claim under
15 the Open Meetings Act parameters and guidelines because
16 they're not covered by that statute.

17 So I mean, let's assume that they were covered.
18 That just means that the State got away with not
19 reimbursing school districts for the school site
20 councils for all of the years up until we qualified for
21 reimbursement under this statute. And so it doesn't
22 matter.

23 MR. SHERWOOD: Any further questions? We have
24 the motion, we have the second, and would you go ahead
25 and amend that motion that relative to, let's see -- was
26 there need to, really?

27 MS. STEINMEIER: Well, no, I asked you if there
28 was.

1 MR. SHERWOOD: I'm just not sure there is.

2 MS. STEINMEIER: I think there's enough here to

3 do it, my personal opinion, especially in light of that

4 last discussion. But if you personally would like to

5 have a discussion about the compulsory nature of the

6 this or nonvoluntary nature of this, we can do that.

7 But we don't need to. My motion stands the way it is.

8 MR. SHERWOOD: Motion and second. Call roll.

9 MS. HIGASHI: Ms. Gomes.

10 MS. GOMES: No.

11 MS. HIGASHI: Mr. Lazar.

12 MR. LAZAR: Yes.

13 MS. HIGASHI: Mr. Sherwood.

14 MR. SHERWOOD: Yes.

15 MS. HIGASHI: Ms. Steinmeier.

16 MS. STEINMEIER: Aye.

17 MS. HIGASHI: Mr. Beltrami.

18 MR. BELTRAMI: Yes.

19 MS. HIGASHI: Mr. Foulkes.

20 MR. FOULKES: Nay.

21 MS. HIGASHI: The motion carries.

22 MS. STEINMEIER: We moved something.

23 MR. SHERWOOD: Thank you very much.

24 MR. CUNNINGHAM: We'd be happy to have the

25 discussion with you on the --

26 MR. SHERWOOD: Member Beltrami would like to

27 make a comment.

28 MR. BELTRAMI: I was quite taken by Ms. Hill's

1 letter, and its comparisons on the Hayes and the
2 Sacramento analysis. And so when some of those issues
3 come up, I hope they will consider her comments in the
4 future, if any such issue ever comes back.

5 MS. HIGASHI: Like SEMS.

6 MR. SHERWOOD: Paula, I -- is there anyone in
7 the public that would like to make any comments? We are
8 going to be moving on to closed session. Please come
9 forward if you do. Thank you.

10 We're going to be recessing into closed session.
11 The Commission will now meet in closed executive session
12 pursuant to Government Code section 11126, subsection E,
13 to confer with and receive advice from legal counsel for
14 consideration and action as necessary and appropriate
15 upon the pending litigation listed on the published
16 notice and agenda. Thank you.

17 MS. HART JORGENSEN: Five-minute recess, please.

18 MR. SHERWOOD: Five-minute recess, please.

19 (Whereupon the hearing concluded at 12:07 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify the foregoing hearing was held
at the time and place therein named; that the
proceedings were reported by me, a duly certified
shorthand reporter and a disinterested person, and was
thereafter transcribed into typewriting.

In witness whereof, I have hereunto set my hand
this 12th day of April, 2000.

Yvonne K. Fenner
Certified Shorthand Reporter
License No. 10909

